85-489

Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

LEONARD C. JAQUES,
Petitioner,

-vs-

HON. ANN ALDRICH, United States District Court Judge for the Northern District of Ohio, Eastern Division, and REISS STEAMSHIP COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER, IN NON-SUMMARY CIVIL CONTEMPT PROCEEDINGS AGAINST AN ATTORNEY UNDER 18 USC §401, THE REQUIREMENTS OF FEDERAL PROCEDURE AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT ARE SATISFIED BY PROCEEDINGS IN WHICH NO EVIDENCE AGAINST PETITIONER WAS INTRODUCED, THE BURDEN OF DISPROVING THE CHARGES WAS IMPOSED ON PETITIONER, AND THE CONTEMPT FINDING RESULTED FROM THE COURT'S RELIANCE ON *EX PARTE* ACCOUNTS MADE TO HER IN PETITIONER'S ABSENCE AND HER BELIEF THAT PETITIONER HAD FAILED TO SUSTAIN THE BURDEN OF DISPROOF IMPOSED ON HIM BY THE COURT.

II. WHETHER 18 USC §401(3) IS TO BE CONSTRUED AS PROVIDING FOR THE IMPOSITION OF CONTEMPT SANCTIONS ON AN ATTORNEY FOR SENDING AN ASSOCIATE TO COURT IN HIS STEAD WHERE THERE HAS BEEN NO FORMAL ORDER REQUIRNG HIS PERSONAL APPEARANCE BUT INTERMEDIARIES HAVE BEEN REQUESTED TO ORALLY ADVISE THE ATTORNEY THAT HIS ATTENDANCE IS "EXPECTED."

III. WHETHER 18 USC §401(1) IS TO BE CONSTRUED AS PROVIDING FOR THE IMPOSITION OF CONTEMPT SANCTIONS ON AN ATTORNEY FOR THE PURPORTED MISREPRESENTATIONS MADE BY HIS ASSOCIATE IN MARYLAND TO THE CLERK OF AN OHIO JUDGE WHERE THE PETITIONER MADE NO REPRESENTATIONS HIMSELF AND WAS NOT SHOWN TO HAVE HAD KNOWLEDGE OF OR PARTICIPATION IN THE STATEMENTS MADE BY HIS ASSOCIATE.

PARTIES TO PROCEEDINGS

Petitioner LEONARD C. JAQUES is an attorney and a member of the Bar of this Court.[1] His law firm represented the plaintiff, Ali Ahmed, in an admiralty action against Respondent Reiss Steamship Company ("Reiss Co."). After the *Ahmed* action was amicably resolved between the parties, Reiss Co. and Ahmed had no further involvement in the proceedings now before this Court.

The *Ahmed* suit was assigned to the Hon. Ann Aldrich, Respondent herein. Feeling herself aggrieved by developments in the *Ahmed* case, Respondent Aldrich *sua sponte* issued an Order to Show Cause, thereby initiating contempt of court proceedings against Petitioner and two of his associates. At the contempt hearing (which was later found to be civil in nature), the only participants were Respondent Aldrich and the alleged contemnors.

Due to uncertainty as to whether the proceedings were intended as civil or criminal in nature, and whether there were any parties adverse to petitioner, the appeal proceeded under the caption *In Re Jaques*. Copies of Petitioner's Brief were filed with the Court and served on both Reiss Co. and the United States Attorney's office. No opposing party filed responsive pleadings in the Court of Appeals or participated at oral argument.

These are the circumstances which have resulted in the designation of both Reiss Co. and Judge Aldrich as Respondents herein. Both, as well as the United States Attorney's office, have been served with this Petition for Certiorari.

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[1] Petitioner was the attorney for the successful plaintiff in *Vella* v. *Ford Motor Co.*, 421 U.S. 1 (1975).

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OPINIONS BELOW

The opinion of the District Court finding Petitioner in contempt of court is reported as *Ahmed* v. *Reiss S.S. Co.*, 580 F. Supp 737 (N.D. Ohio, 1984). The Opinion of the United States Court of Appeals for the Sixth Circuit is reported as *In Re Jaques*, 761 F2d 302 (6th Cir., 1985). The Court of Appeals Order denying the Petition for Rehearing, issued June 24, 1985, is unreported.

SUPREME COURT JURISDICTION

Upon issuance of the Court of Appeals opinion of May 6, 1985, Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc. On June 24, 1985, the Court of Appeals issued its order denying rehearing. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION, STATUTE INVOLVED

Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18, United States Code, §401:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as —

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command.

STATEMENT OF THE CASE

This petition for certiorari arises from the citation of an attorney for contempt by the Honorable Ann Aldrich, United States District Court Judge for the Northern District of Ohio, Eastern Division. The alleged contemnor, Leonard C. Jaques (Petitioner herein), was one of the attorneys representing the Plaintiff in *Ahmed* v. *Reiss Steamship Co.* (Civil Action No. C 80-506), an admiralty case pending before Judge Aldrich which was eventually settled. The background of the *Ahmed* case and the contempt proceedings are as follows.

Ahmed v. Reiss Steamship

In this Ohio action, both parties were represented by Detroit, Michigan law firms. Throughout the pretrial proceedings, a number of attorneys from each law firm participated in the case[2]. In due course, a "Trial Order" was

[2] For the Plaintiff in *Ahmed*, Gary Baun handled the bulk of pre-trial matters. He drafted two sets of Interrogatories, two Requests to Produce, a reply to a defense discovery motion, a motion to compel, two deposition notices, and the Pre-Trial Brief. Baun also attended the pre-trial conference and a deposition. He was apparently viewed as lead counsel by the Court, as the Trial Order and Notice of Final Pre-Trial were sent to him.

(Footnote 2 continued on next page)

issued requiring trial briefs which were to include the name of trial counsel. In the brief for Ahmed, Gary Baun, an associate of Mr. Jaques, designated Jaques as Ahmed's trial counsel.

A second "Trial Order" was issued to Baun on August 1, 1983. This Order rescheduled the trial for October 24, 1983. While the court record[3] does not indicate why the trial was rescheduled, this was purportedly as an accommodation to Plaintiff and his counsel [Memorandum and Order of February 23, 1984 ("M & O"), p. 2]. At the time the Court set the trial date as October 24, 1983, Mr. Jaques and Mr. Baun were already scheduled to begin a trial in Baltimore, Maryland on October 17, 1983.

The Court was informed on October 19, 1984 that the Baltimore trial was taking longer than anticipated. The

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(Footnote 2 continued from previous page)

Additional depositions were handled by other members of the firm. Dennis O'Bryan attended one deposition and Robert Swickle attended four depositions.

Petitioner signed the Complaint, voir dire and jury instructions. Other than being designated by Baun as the expected trial attorney, it does not appear that Mr. Jaques had any further record involvement with the case prior to trial.

The pre-trial proceedings for the Defendant in *Ahmed* were conducted primarily by Mark Dailey. While he and John Arthur Hamilton were designated as trial counsel in the Pre-Trial Brief, Robert Dunn eventually conducted trial proceedings for the steamship company.

[3] One of the major difficulties in this case is the lack of evidence, in the nature of testimony, orders, pleadings or other formal court records, which would reliably establish all of the pertinent facts. For the purpose of this Statement of the Case, Petitioner has cited the District Court's unsworn recitation of her understanding of the facts as reflected in the transcripts of October 26, 1983 and December 22, 1983, the unsworn versions of Petitioner and his associates on the same dates, and the Memorandum and Order.

In referring to these sources, Petitioner in no sense acknowledges that the Court's "findings" are factually accurate, nor does he acquiesce in the procedures which led to the inadequate state of the record. Indeed, a central feature of this Petition is his objection to the quaint procedure whereby he was found in contempt without any sworn witnesses having been presented against him and whereby the Court effectively acted as complainant, prosecutor, witness, judge and trier of fact.

Court thereupon orally rescheduled the *Ahmed* case to begin trial on October 26th with the pre-trial to be held at 4:00 p.m. on October 25th[4].

On October 24th, the Baltimore judge's clerk advised Judge Aldrich or her clerk that the Baltimore trial would continue on to the 25th. Judge Aldrich's clerk then called Mr. Swickle, advising him of the October 25th pre-trial (Tr. of 12/22/83, pp. 33-34). When the clerk was unable to reach defense counsel, she called Swickle back, rescheduling the pre-trial for the morning of October 26th, as it was anticipated that the *Ahmed* trial would commence after the pre-trial (Tr. of 12/22/83, p. 34).

Judge Aldrich's clerk then related the "order" which Petitioner was found to have violated. The clerk left word with the Baltimore judge's secretary that she was "to advise Mr. Jacques (sic) that we expected him to be here on Wednesday, the 26th for trial" (Tr. of 10/26/83, p. 3) or that, "we would expect Mr. Jacques (sic) for trial beginning on Wednesday at 9:30 a.m." (Tr. of 12/22/83, p. 2). In her Memorandum and Opinion, p. 4, Judge Aldrich found that the telephone message was "that Jaques would be expected for a pre-trial conference followed immediately by trial, beginning Wednesday, October 26 at 9:30 a.m." There is no evidence whether this was related to Jaques or, if it was, the message which was conveyed.

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[4] The events of October 19th are far from clear. On one occasion, the Court implied that the call came from Mr. Jaques personally (Tr. of 10/26/83, pp. 2-3). She later recalled that the call came from Jaques' office (Tr. of 12/22/83, p. 2). She resolved this inconsistence in her Memorandum and Order by finding, in accord with her version of December 22, 1983, that the call was from Jaques' office (M & O, p. 3)

A fair reconstruction of the events of October 19th is that an unknown employee of the law firm spoke to Judge Aldrich's clerk, explained the delay in the Baltimore trial, and indicated that the best projection available was that the Baltimore trial could end on the 24th. The *Ahmed* proceedings were then rescheduled and the office personnel for the attorneys were notified of the October 26th trial and October 25th pre-trial dates.

At about 6:00 p.m. on the 25th, Gary Baun called Judge Aldrich's court clerk. According to the Court's understanding, Baun represented that Mr. Jaques would be unable to appear on the 26th because the Baltimore trial remained in progress requiring Jaques' presence. Mr. Baun, the only participant in the conversation to testify to its substance, stated that he advised the clerk that the Baltimore trial remained in progress and that Baun could therefore not be in Cleveland. No representation was made by Baun as to Jaques (Tr. of 12/22/83, pp. 39-43).

It is undisputed that Petitioner did not participate in the conversation, and there is no evidence that he was aware of, let alone sanctioned or directed, Baun's comments during the telephone conversation. It is also undisputed that the Baltimore trial in fact continued on to October 26th with Baun in attendance.

When the 26th arrived, both parties were represented by attorneys other than those identified as trial counsel in the respective Pre-Trial Briefs. The Defendant was represented by Mr. Dunn rather than Mr. Dailey or Mr. Hamilton,[5] and the Plaintiff was represented by Mr. Swickle.

Mr. Swickle, who had had prior involvement with the case (see fn. 2, *supra*), appeared at 8:30 a.m. on the morning of October 26th with the file prepared to try the case if settlement negotiations at the pre-trial were unsuccessful (Tr. of 12/22/83, p. 34). Settlement discussions between counsel showed promise, but Ahmed was reluctant to settle.[6]

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[5] Unlike Petitioner, the defense attorneys designated in the Pre-Trial Brief were not charged with contempt for sending an associate in their stead.

[6] It should be noted that this was within approximately one week of the killing of hundreds of American soldiers in Lebanon, an event symptomatic of the relationship between America and the Middle East countries. The impact of these hostile times cannot have been lost on Ahmed, a Yemenese national facing an American jury. The Court recognized that Mr. Ahmed was a "difficult client" (Tr. of 12/22/84, p. 15).

On the following trial day, Mr. Jaques arrived and a jury was selected. Settlement discussions were reaching the prospect of fruition, and the case was postponed until defense counsel could communicate with the insurer in London. The defendant increased its offer by $25,000.00 and the case was fully settled by October 31, 1983.

Contempt Proceedings

On November 2, 1983, Judge Aldrich *sua sponte* issued an Order requiring Jaques, Baun and Swickle to appear on December 22, 1983 to "show cause why sanctions should not be imposed and the responsible parties held in contempt of court for apparent misbehavior related to a failure to appear before this Court as scheduled on Wednesday, October 26, 1983." The accused were ordered to "appear for a hearing and be prepared to present any evidence on their behalf with respect to this apparent misrepresentation and delay."

No prosecutor was appointed to conduct the proceedings, and neither Reiss Co. nor its attorneys participated. Indeed no witness was sworn, and no proofs in support of the prosecution were taken, as Judge Aldrich believed that, "It's not the Court's burden to put on the evidence" (Tr. of 12/22/83, p. 30).

Instead, the Court commenced the proceedings with a recitation of her understanding of the events. Her primary concern was that she understood from her clerk that Baun had said Jaques could not attend trial on Wednesday, October 26th, because he was required to be present at the Baltimore trial, while she understood from Judge Howard that Jaques had been excused from the Baltimore trial on the 25th to attend Court in Cleveland the following day. Thus, "Judge Howard believed that Mr. Jaques was in Cleveland and this Court believed that Mr. Jaques was in Baltimore. Apparently, he was at neither place" (Tr. of 12/22/83, p. 5). The Court's recitation presumably hinged entirely on what she had been told by her clerk and Judge

Howard. The Court then called on the accused to adduce "whatever facts there are or justifications there may be".

The accused vociferously objected to the proceedings and the propriety of the procedures invoked by Judge Aldrich (Tr. of 12/22/83, pp. 6-27). Petitioner contended that the Court was engaged in a personal vendetta, and objected to the Court becoming personally involved in the questioning. When these objections were not sustained, the accused presented their position as to the substantive charges.

Petitioner Jaques denied the allegation that he was guilty of contempt in failing to appear for the *Ahmed* trial on October 26th. He contended that there was no order requiring his personal appearance on the 26th and that any obligation to appear was that of the law firm. Petitioner contended that this duty was discharged by the presence of Mr. Swickle, who had full settlement authority, and was prepared to try the case if the Court had not continued settlement negotiations.

At the hearing, the Court admitted that, "if . . . someone from you office was here and ready to go forward on Wednesday morning, October 26th, then I think you have fulfilled your obligations to have someone here" (Tr. of 12/22/83, p. 19). Despite the uncontraverted statements that Swickle was prepared to try the case, Judge Aldrich found otherwise, citing Swickle's inability to unilaterally settle the case (M & O, pp. 4, 9-10). This rationale was based on Swickle's statement of October 26, 1983 (in Petitioner's absence) suggesting that Mr. Ahmed had a better relationship with Mr. Jaques and that a face-to-face meeting between the two could facilitate the prospect of settlement (Tr. of 10/26/83, p. 4)[7].

[7] The Court never explained how the client's desire to meet with Mr. Jaques necessarily implied that Swickle could not have tried the case. Attorneys are often prepared to go to trial for a client who is reluctant to follow their settlement advices. The Court's rationale — that an attorney who defers to the client is *ipso facto* unprepared for trial — could be just as well applied to defense counsel, who had to get settlement authority from his client's insurer in London.

Petitioner also offered as an exhibit a letter from his personal physician attesting that he had a medical affliction of the gential area which produced incessant itching and scratching and made it necessary to avoid public appearances. When this embarrassing affliction was explained only after repeated requests for an explanation, the Court complained that the explanation was too "graphic" and "lacking taste and any respect for courtroom decorum" (M & O, p. 10).[8] She nonetheless agreed that Petitioner's medical problems prevented him from attending trial on the 26th "Jaques clearly had personal problems which prevented him from complying with this Court's order to appear in Cleveland on Wednesday, October 26, 1983" (M & O, p. 20). Despite this, Judge Aldrich held Petitioner in contempt for failure to appear on October 26th.

As to the second charge — "misrepresentation" — Petitioner repeatedly stated that he had not personally made any representations to Judge Aldrich's clerk to the effect that he would be in Baltimore on the 26th (Tr. of 12/22/83, pp. 11, 13, 25). Despite the lack of evidence of Jaques' involvement in the Baun phone call of October 25th, Judge Aldrich found Petitioner responsible. In doing so, the Court rejected Baun's explanation of his statements to the clerk, apparently relying on the court's *ex parte* conversations with her clerk who presumably gave a different account.

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[8] The Court of Appeals also took umbrage at Petitioner's explanation of the affliction which necessitated his absence (761 F.2d at 306, 307, 308). However, Petitioner was not charged with misconduct at the hearing of December 22, 1983; hence his conduct on that date was not before the Court or relevant to the issues presented.

It must further be noted that Petitioner's "graphic" explanation was all but compelled by Judge Aldrich herself, as she repeatedly demanded to know why he was absent. The language employed in the explanation was clinically accurate and no vulgarity was used. While the subject was no doubt embarrassing (particularly to Petitioner), it is difficult to imagine how Petitioner might have otherwise complied with the Court's directive to explain the reason for his absence. In any event, the suggestion that the use of ill-mannered language to discuss a germane issue constitutes contumacious conduct by a lawyer was put to rest in *In Re Snyder*, 472 U.S. _____ (No. 84-310, decided June 24, 1985).

The Court's Memorandum and Order was issued on February 23, 1984. In the final analysis, the Court concluded that Jaques' failure to appear on October 26th constituted a violation of 18 U.S.C. §401(3) and that the purportedly untrue representation made by Baun that Jaques was in Baltimore was a violation of 18 U.S.C. §401(1) (M & O, p. 19). Petitioner was ordered to pay $920.00 (the costs of 22 jurors for October 26th) and to reimburse Reiss Steamship Company for its counsel's hotel and attorney fees for October 26, 1983. Baun and Swickle were absolved of any responsibility.

Petitioner then appealed to the United States Court of Appeals for the Sixth Circuit, raising the questions presented in this Petition for Certiorari. The appeal was assigned to a three-judge panel, consisting of the Hon. Gilbert Merritt, the Hon. Harry Wellford and the Hon. Douglas W. Hillman, which issued its sharply divided Opinion on May 6, 1985.

Judge Merritt concluded that the contempt proceedings had been civil in nature and that "Jaques was therefore not entitled to the procedural protections afforded criminal defendants" (761 F.2d at 306). Judge Merritt rejected Petitioner's due process claims on the ground that civil contempt proceedings required only the procedural safeguards of "notice and a reasonable opportunity to prepare a defense" (761 F.2d at 306). Judge Wellford concurred in this conclusion (761 F.2d at 307).

Judge Hillman, dissenting, found that the procedural rights of Petitioner had been violated in numerous respects. He concluded that it was improper for the Court to impose upon Petitioner the burden of disproving his guilt and to find him in contempt because of her disbelief of the exculpatory explanations offered by Petitioner (761 F.2d at 309). He further found that it was improper for the trial judge to find Petitioner in contempt in the absence of evidence or in reliance on the *ex parte* accounts related to the Court in Petitioner's absence (761 F.2d at 309).

Construing the requirement of an "order" in 18 U.S.C. §401(3), Judge Hillman believed that the statute required a formal, unequivocal order, before even civil contempt sanctions could be imposed (761 F.2d at 310). Finding no such order, he would have reversed on this ground. He also disagreed with the majority's conclusion that §401(3) was violated even though Petitioner's associate appeared in his stead. In Judge Hillman's opinion, "an attorney is not guilty of contempt for non-appearance where an associate appears in his place" (761 F.2d at 309).

The majority did not discuss the rationale by which it affirmed the finding that 18 U.S.C. §401(1) was to be interpreted broadly enough to sustain the finding that Petitioner was responsible for the purported misrepresentation made by his associate, Mr. Baun. Judge Hillman, in dissent, disagreed with this portion of the majority's ruling as well. In his view, Baun's conduct was not "in the court's presence or so near thereto" as to fall within the statutory proscription as construed in *Nye* v *United States*, 313 U.S. 33 (1941). Moreover, Judge Hillman did not believe that §401(3) authorized the imposition of vicarious liability upon one such as Petitioner who neither authorized nor ratified the allegedly false representation (761 F.2d at 310).

In short, the members of the Court of Appeals sharply disagreed on the three questions presented in this Petition for Certiorari. Petitioner now requests that the Court grant this petition to resolve the issue of what procedural safeguards are available to one charged with "civil" contempt, and the issues of statutory construction arising under 18 U.S.C. §401.

THE REASONS WHY CERTIORARI SHOULD BE GRANTED

I. CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER, AS A MATTER OF FEDERAL PRACTICE AND THE FIFTH AMENDMENT'S DUE PROCESS GUARANTEES, THE BURDEN OF PROOF IN AN INDIRECT CIVIL CONTEMPT ACTION MAY BE IMPOSED ON THE ALLEGED CONTEMNOR SUCH THAT, IN THE ABSENCE OF EVIDENCE, HE MAY BE FOUND IN CONTEMPT ON THE BASIS OF THE COURT'S CONCLUSION THAT HE HAS FAILED TO DISCHARGE THE BURDEN OF DISPROVING THE *EX PARTE* ACCOUNTS RECEIVED BY THE COURT FROM OTHERS IN HIS ABSENCE.

The import of the Court of Appeals decision is that in "civil" contempt cases, unlike "criminal" contempt actions, the only procedural safeguards available to the alleged contemnor are notice and an opportunity to be heard. The line of demarcation between "civil" and "criminal" contempts may be far from clear in practice[9], but the theoretical distinction is accurately summarized by the decision below. While Petitioner acknowledges that the contempt proceedings in question were "civil", he challenges the Sixth Circuit's conclusion that the designation of a contempt as "civil" abrogates all procedural guarantees other than the bare essentials of notice and an opportunity to be heard.

The dichotomy which has historically governed the procedures to be employed is that of "direct" and "indirect" contempts. A "direct" contempt is narrowly defined as one which occurs "under the Court's own eye and within its hearing," *In Re Oliver*, 333 U.S. 257 (1948); *United States* v. *Marshall*, 451 F.2d 372 (9th Cir., 1971), or "in the actual presence of the court", F.R.Crim.P. 42(a).

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[9] This case is a fit example of the practical difficulty of identifying contempts as "civil" or "criminal", as even the Court of Appeals judges were unable to agree on the correct characterization of the District Court proceedings.

In the rare case of a direct contempt, the adjudicatory phase may be accomplished by the court summarily finding the defendant in contempt. The only safeguards available to the contemnor are the rights to notice and a hearing on the dispositional phase; the functional equivalent to the right of allocution given a criminal defendant at sentencing.

The justifications for the extraordinary summary procedure in a case of "direct" contempt are two-fold: immediate action is required to preserve the dignity of the court from the affront, and no adjudicatory hearing is required because the court is fully aware, by its own senses, of all the pertinent facts. See *In Re Oliver, supra; Johnson* v. *Mississippi*, 403 U.S. 212, 215 (1971); *United States* v. *Petersen*, 456 F.2d 1139 (10th Cir., 1972); *Matusow* v. *United States*, 229 F.2d 335, 344 (5th Cir., 1956); *In Re Stewart*, 571 F.2d 958, 964 (5th Cir., 1978); *United States* v. *Meyer*, 462 F.2d 827, 831 (App. D.C., 1972).

As this was plainly a case of "indirect" contempt,[10] the justifications which allow a summary adjudication of guilt in the "direct" setting have no application. *Taylor* v. *Hayes*, 418 U.S. 488, 497-498 (1974); *Codispoti* v. *Pennsylvania*, 481 U.S. 506, 515 (1974). If the District Court proceedings can be rationally sustained, it cannot be on the basis that would be applied to a case of indirect contempt, but must hinge on the "civil" nature of the proceedings.

Rather than focus on the "direct"/"indirect" distinction, the Court of Appeals considered only the "civil"/"criminal" characterizations. In limiting the procedural protections in this case of "civil" *indirect* contempt to those bare essen-

[10] There can be no doubt that the contempt presented in this case was "indirect." The conduct in question was not all within the personal knowledge of the Court. Nor was immediate action necessary to preserve the Court's dignity. That the trial judge realized as much is manifest from her decision to proceed by the order to show cause procedure applicable to indirect contempts rather than the summary procedure available in the case of direct contempts. See F.R.Crim.P. 42. Neither lower court has so much as hinted that this was a case of "direct" contempt.

tials available in a *direct* contempt setting, the Court of Appeals struck out in a direction unsupported by the precedents of this Court or other circuits, and contrary to the principles of 18 U.S.C. §401 and F.R.Crim.P 42 which govern "civil" and "criminal" contempts alike.

The opinions of this Court have occasionally discussed the differences between "civil" and "criminal" contempts, but have rarely considered what, if any, procedural consequences flow from the distinction. Indeed, the propriety of casting the burden of proof upon an alleged civil contemnor was expressly reserved in *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911):

> "Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent [and] must be proved to be guilty . . ."

In the wake of *Gompers*, this Court has suggested, without expressly holding, that while the "direct"/"indirect" dichotomy is of paramount importance, the procedural requirements in a "civil" indirect contempt are identical to those in "criminal" indirect contempt. For example, in *Shillitani* v. *United States*, 384 U.S. 364, 371 (1966), the Court assumed that "the usual due process requirements" would apply to civil contempts as to criminal contempts. Moreover, the rights accorded alleged criminal contemnors do *not* derive from the Sixth Amendment, for "criminal" contempt proceedings are not the "criminal prosecutions" to which that Amendment is limited. Rather, those rights stem from the Fifth Amendment guarantees which apply to deprivations of both "property" and "liberty". *Levine* v. *United States*, 362 U.S. 610, 616 (1960). Given this source of the procedural protections historically afforded to those charged with contempt, there is no principled basis for confining those protections to persons whose contempt citations are ultimately deemed "civil."

As a matter of federal procedure, there is no basis for making the "civil"-"criminal" characterization the litmus test. As the Court of Appeals correctly observed, "civil" and "criminal" contempt actions alike arise under 18 U.S.C. §401 [761 F.2d at 305, citing *United States ex. rel. Shell Oil Co* v. *Barco Co.*, 430 F.2d 998, 1000 (8th Cir., 1970)].

Indeed, in the unique contempt setting, the Federal Rules of Criminal Procedure govern both civil and criminal contempts. As this court stated in *Harris* v. *United States*, 382 U.S. 162, 167 (1965), "Rule 42(b), prescribes the 'procedural regularity' for all contempts in the federal regime except those unusual situations evisioned by Rule 42(a) where instant action is necessary to protect the judicial entity itself."

In the contempt setting, the labels "civil" and "criminal" have no real substantive meaning other than to describe the purpose for which action was taken. The substantive limitations of 18 U.S.C. §401 apply to each species of contempt, as do the procedural limitations of Rule 42. The "criminal" contemnor and "civil" contemnor alike face fine, imprisonment, or both.[11] Nothing in the decisions of this Court or other Courts of Appeal, or in the contempt jurisprudence of this nation, supports the Sixth Circuit's limitations on the procedural protections afforded one charged with contempt.

Consider as well the frequency with which civil and criminal contempts are confused even by those trained in the law. And, consider the difficulty in deciding whether a particular contempt action is "civil" or "criminal." It is a fundamentally unsound doctrine which would resign essential rights to the vagaries of whether, years after the fact, a particular contempt citation is denominated a "civil" or "criminal" contempt.

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[11] For an account of renowned cases where one charged with "civil" contempt has been imprisoned for years on end, see *Uphaus* v. *Wyman*, 364 U.S. 388, 398-400 (1960) (Black, J., dissenting).

This is particularly so in light of the Congressional intent behind the passage of §401. That statute and its predecessor were intended to strictly circumscribe the use of the contempt power which had formerly been abused by the judiciary. See *Nye* v. *United States*, 313 U.S. 331 (1941); *Cammer* v. *United States*, 350 U.S. 399 (1956). To permit the talismanic incantation "civil" to undercut the protections which Congress intended to confer would conflict with the very purpose of the statute which the District Court sought to enforce.

In sum, Petitioner requests that the Court grant certiorari to consider whether the procedural protections afforded one charged with "civil" contempt under 18 U.S.C. §401 are those afforded to one charged with "criminal" contempt under the same statute. That question should, as a matter of federal procedure, be answered in the affirmative.

There can be no serious doubt that the contempt citation could not stand under the principles applied to a criminal contempt action. Petitioner was found in contempt essentially because the Court disbelieved the exculpatory explanations offered by Petitioner in his unsuccessful effort to discharge the burden of proof thrust upon him by the trial judge. As was held in *In re Van Meter*, 413 F.2d 536, 538 (8th Cir., 1969) and the cases cited therein, the issuance of an order to show cause does not shift the burden of proof to the alleged contemnor.

In this respect, the decision below conflicts with the Fifth Circuit's decision in *Matusow* v. *United States*, 229 F.2d 335 (5th Cir., 1956) and the Sixth Circuit decision in *North American Coal Corp.* v. *Local Union*, 497 F.2d 459 (6th Cir., 1974). In *Matusow*, the Fifth Circuit had no occasion to decide whether the contempt was "civil" or "criminal," as in its view the burden of proof remained on the Government which charged the contempt [229 F.2d at 347]. Likewise, in *North American Coal Corp.* the Sixth Circuit did not limit to "criminal" cases its holding that the burden of proof remains on the party charging contempt and that a

contempt finding may not be based on the court's disbelief of the evidence offered to discharge the burden of proof erroneously imposed on the accused. Certiorari should be granted to resolve this split of authority on so fundamental an issue of contempt jurispurdence.

Secondly, the Court's rendition of her understanding of the facts plainly stems not from any evidence adduced at the contempt hearing but from *ex parte* accounts provided to the Court in Petitioner's absence by persons never presented as witnesses. In finding that Mr. Swickle was not prepared to try the *Ahmed* case in Petitioner's absence, the Court relied on a transcript of Swickle's comments, again offered in Petitioner's absence. The decision maker's reliance on "facts" gathered in Petitioner's absence would not be tolerated in a criminal contempt case. This is the express teaching of *In re Oliver*, 333 U.S. 257, 273 (1948). Other cases so holding include *Matusow* v. *United States*, 229 F.2d 335, 347 (5th Cir., 1956) and *United States* v. *Seale*, 461 F.2d 345, 372 (7th Cir., 1972). Petitioner is aware of no authority other than the Sixth Circuit decision in this case which allows reliance on *ex parte* proceedings because of the "civil" nature of the contempt charge.

Finally, Judge Aldrich, by initiating the proceedings, served the role of complainant. Rather than appointing the United States Attorney to prosecute the charge, she took that role upon herself, and in that role conducted the cross-examination of Petitioner, which placed her and Petitioner, acting *in pro per*, as opposing counsel. To the extent that she sought the version of her clerk, she acted as investigator. She did all of this while presiding over the proceedings. She then proceeded to act as adjudicator, a role requiring her, in essence, to assess her success as a prosecutor, and the competency and credibility of herself as a "witness" relating what she had been told by others. The multitude of inherently conflicting roles played by the Court would not be allowed in a criminal contempt proceeding. *In re Murchison*, 349 U.S. 133 (1955); *In re Oliver, supra;*

United States v. *Columbia Systems, Inc.*, 497 F.2d 107 (5th Cir., 1974). Again, the case law provides no support for the notion that the right to an impartial contempt adjudicator is unavailable in "civil" contempt proceedings.

Over and above the questions of federal procedure are the due process implications of the District Court hearings. On that score, as well, certiorari is in order.

The right to an impartial decision-maker, the right to be present and cross-examine those who provide their information to the fact-finder, and the right to insist that the Government bear its burden of coming forward with evidence, these are the rights at stake. They do not exist merely by legislative grace. Each is grounded in the Due Process guarantees conferred by the Fifth and Fourteenth Amendments. Whether such fundamental protections are unavailable simply because the proceedings are labelled "civil" is a question which has not, but should be, addressed by this Court.

That the Constitutional language requires due process before either "liberty" or "property" is taken from a citizen belies any suggestion that the labels "civil" and "criminal" are determinative. Concededly the concept of "due process" is a flexible one requiring consideration of the particular interests involved in a given proceeding. *Santosky* v. *Kramer*, 455 U.S. 745 (1982); *Matthews* v. *Elridge*, 424 U.S. 319, 335 (1976). And, concededly, the liberty interests implicated in a traditional "criminal" proceeding have sometimes been held to require procedural protections unnecessary in the traditional "civil" action where only money is involved.

While the terms "civil" and "criminal" may be shorthand descriptions for the varying interests that may warrant separate due process balancing tests, this Court had not allowed the mere shibboleth "civil" to supplant the requisite analysis of the competing interests. Burden of proof cases have emphasized this point. For example, in *In re Winship*, 397 U.S. 358 (1970), the historically "civil" nature of juvenile court proceedings did not deter the Court from recog-

nizing that the Due Process guarantees of the Fourteenth Amendment required that the prosecution bear the burden of proof. Likewise, in *Santosky, supra*, the Court determined that, in parental termination proceedings, Due Process guarantees required the State to prove its "civil" charges by clear and convincing evidence.

Indeed, in *Addington* v. *Texas*, 441 U.S. 418, 423 (1979), the Court strongly implied that even in the ordinary "civil" case, imposition of the burden of proof on the plaintiff was rooted in Due Process guarantees. Discussing "[t]he function of a standard of proof, as the concept is embodied in the Due Process Clause", the Court in *Addington* stated that in "the typical civil case involving a monetary dispute," the plaintiff bears the burden of proving the charges by a preponderance of the evidence. Even application of this standard would require reversal in this case where no inculpatory evidence was introduced.

The Court could quite properly conclude that the Due Process guarantees of the Fifth and Fourteenth Amendments require the party seeking affirmative relief (the plaintiff) in a "civil" case to bear the burdens of going forward and persuasion. No such sweeping holding is required, for at least this is so in the context of a "civil" contempt action prosecuted under 18 U.S.C. §401.

If ever the terms "civil" and "criminal" have limited functional significance it is in the contempt setting. The "civil" and "criminal" contemnor alike are subject to not only a fine but the incarceration which is the customary earmark of a "criminal" action. It is of scant practical effect that one jailed by a federal judge for contempt has suffered this sanction for coercive ("civil") rather than punitive ("criminal") reasons.

Where the object of the court's wrath is an attorney, even further liberty interests are involved. Contempt proceedings may trigger bar disciplinary action which threatens the contemnor's license to practice. The opportunity to prac-

tice law is itself a liberty interest triggering Due Process protections greater than those presented in the customary "civil" suit. *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 257-258 (1957); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238-239 (1957).

The Sixth Circuit's use of the facile epithet "civil" simply begs the question of what safeguards are due in a civil contempt proceeding. This fundamental Due Process inquiry requires weighing three factors: the private interests affected by the proceeding; the risk of error created by the challenged procedure; and the countervailing governmental interest supporting use of the challenged procedure. *Santosky*, *Matthews*, *Addington*.

As has been suggested, one facing incarceration for "civil" contempt under 18 U.S.C. §401 and F.R.Crim.P. 42 has the same essential interest as one facing incarceration in a "criminal" action under the same statute and Rule. There is no principled basis for denying the alleged "civil" contemnor the protections available to his "criminal" counterpart.

Moreover, the specific rights in question strongly implicate the risk of an erroneous judgment. Without being present and able to cross-examine those whose information accuses him, the defendant does not even know precisely what has been charged against him, much less is he able to test the veracity of the witness, the witness's power of recall and observation, or the certainty of the witness's memory. Likewise, the rights to an impartial decison-maker and to imposition of the burden of proof on the government are not mere technicalities but strike to the heart of the fact-finding process and its reliability.

Finally, the Government's interests supporting the challenged procedure is insubstantial. To be sure, there may be legitimate Governmental interests in a truncated procedure for trying the exraordinary case of direct contempt. But such considerations provide no basis for procedural short-

cuts in a case such as this involving an alleged indirect contempt. See *Taylor, supra; Codispoti, supra*. Where, as here, a hearing is required, there is little additional burden on the government to require that the party bringing the charges introduce evidence in support of those charges. The most that can be said is that the burden of using customary procedural safeguards in a civil contempt case would be the same as that arising in a criminal contempt case — customarily, a brief evidentiary hearing. The purported virtue of expediency for its own sake cannot detract from the desirability of procedures adequate to the important interests at stake in a civil contempt action.

The issue presented has not been definitively resolved by this Court. The decision of the Sixth Circuit is inconsistent with those of the other Circuits, leaving the federal jurisprudence on such a fundamental issue in a state of uncertainty. The issue is timely, given the prevailing sentiment toward increased discipline of attorneys thought to have delayed the course of justice. It is, as well, one which involves the historical Congressional intent, in enacting 18 U.S.C. §401, to curb the judicial contempt power. The Court should grant certiorari to consider the important questions presented.

II. CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER A TELEPHONIC MESSAGE, TO BE RELATED TO THE ACCUSED ATTORNEY THROUGH AN INTERMEDIARY, THAT HIS PRESENT IS "EXPECTED," IS AN "ORDER" WITHIN THE MEANING OF 18 U.S.C. §401(3) SUCH THAT THE ATTORNEY HAS VIOLATED THE STATUTE BY SENDING AN ASSOCIATE IN HIS PLACE.

The decision below embodies a construction of 18 U.S.C. §401(3) that should be reviewed by this Court. In particular, the court below has construed the telephone request, purportedly relayed to Petitioner, that he was "expected" in court, as an "order" as that term is used in the contempt statute. And, the court below has decreed that §401(3) is offended under these circumstances, even though the attorney in question obtains the presence of an associate in his stead. Each point of construction is at odds with the decisions of other Courts of Appeals, and the limiting purpose behind the statute.

As the record reflects, the pertinent directive which Petitioner was deemed to have violated was the telephone message from Judge Aldrich's clerk that he was "expected" to appear at the courthouse in Ohio. While the Sixth Circuit has found that a telephone message of expectation constitutes an "order" under the statute, other courts have made it clear that greater formality is required.

A strikingly similar case to this is *In Re Stewart*, 571 F.2d 958 (5th Cir., 1978) where the employer of a juror was charged with contempt for disobeying the court's message, purportedly related through the employee-juror, that the employer was not to take action adverse to the employee because of his jury service. The Fifth Circuit reversed, holding:

> "Sub-section (3) [of 18 U.S.C. §401] was not violated. Stewart disobeyed no writ, process, or decree of the district court. Even if the proof had established the

content of Judge Cox's message to Subblefield and had established that Subblefield accurately relayed it, *an oral 'message' such as this, not stated in open court where it could be taken down by a court reporter, addressed to a person not before the court, never entered upon the records of the court, and relayed by word of mouth through a person without official status, is not an 'order' or 'command' within the meaning of subsection (3)*". (Emphasis supplied).

In *In Re LaMarre*, 494 F.2d (6th Cir., 1974), an insurance adjustor was repeatedly advised by telephone that the trial judge desired his attendance at settlement discussions. When he was held in contempt under §401(3) for refusing to attend, the Sixth Circuit reversed, noting that a telephonic "request" did not constitute an "order" cognizable under §401(3):

"[A]s far as the appellate record is concerned, [the trial judge] never employed either word ['required' or 'ordered'] until after LaMarre's arrest. The word he did use repeatedly was the more polite (but less definite) word 'request'." (494 F.2d at 755).

* * *

"[The] cases hold or imply that for an 'order' or 'command' to be enforced by criminal contempt proceedings, it must be clear and definite and 'entered' upon the record or records of the court. These standards strongly suggest that such order be permanently preserved for review. This normally means a written order issued by the court and personally served upon the alleged contemner. Such an order, however, may likewise be enforceable if entered in open court in the presence of the person concerned or with his knowledge clearly proved" (494 F.2d at 758).

* * *

"To recapitulate, we believe that it goes without saying that the preceding 'requests' of the District Judge

which were not entered on the court record, no matter how appropriate they may have been, were not orders which served to put LaMarre on notice that his freedom was in jeopardy if he failed to comply. This was knowledge that he was entitled to have.

We hold that under the circumstances of the instant case the *judicial* instruction of February 22 at 3:15 p.m. which was oral in nature and was transmitted by telephone to be relayed to LaMarre by word of mouth, and which instruction was never entered upon the record of the court, was not an enforceable 'order' or 'command' within the meaning of 18 U.S.C. § 401(3) (1970)" (494 F.2d at 758-759).

To the same effect is *In Re Joyce*, 506 F.2d 373, 378 (5th Cir., 1975) where the Appellant was cited for contempt for disobeying the Court's "request" to cooperate in establishing a pen register. Citing *In re LaMarre*, the Fifth Circuit held that the "request" did not constitute an "order", the violation of which would give rise to contempt sanctions under 18 U.S.C. §401(3).

Of like import is *Finney* v. *Arkansas Board of Correction*, 505 F.2d 194, 213 (8th Cir., 1974). In *Finney*, the Eighth Circuit held that judicial language strongly implying that certain measures should be taken is not tantamount to the clear unequivocal order required for liability under 18 U.S.C. §401(3). See also *United States* v. *Joyce*, 498 F.2d 592 (7th Cir., 1974) and *In Re Weeks*, 570 F.2d 244, 245, fn. 1 (8th Cir., 1978).

The Court of Appeals declined to follow this line of authority because the proceeding was civil rather than criminal and because the Court was convinced that Petitioner knew of the trial judge's expectations (761 F.2d at 307, fn. 3). Neither rationale is recognized by the authorities cited above and neither can withstand critical scrutiny.

Much of what is said above about the illusory "civil"/"criminal" contempt dichotomy applies to this ques-

tion as well. More to the point, the issue is simply one of statutory construction and has no bearing on whether the statute is invoked criminally or civilly. Either the term "order," as used in §401(3), encompasses a verbally related expectation such as this or it doesn't.[12] The difference between a civil §401(3) proceeding and a criminal §401(3), slight in any event, has absolutely no rational bearing on the critical issue of statutory instruction: the meaning of the statutory term "order".

In addition, the Court's observation that Petitioner knew that he was expected truly misses the point. In the contrary line of authority such as *LaMarre*, *Stewart*, *Finney*, *Weeks* and *Joyce*, there was no doubt that the alleged contemnor was aware that the Court expected a particular course of conduct. The formality requirements imposed by those cases serve purposes far broader than assuring notice in the general sense.

First of all, the statute itself lists those expressed desires of the judiciary the violation of which is prohibited. When Congress has so limited the grounds for contempt, it is not the province of the judiciary to read into the statute other judicial acts which it believes to be the functional equivalent of those articulated by Congress. If it is true that Congress did not intend to make the disappointment of orally delivered "expectations" contumacious, it is no answer that Petitioner was aware of those informal expectations.

The formality requirements also serve the important purpose of establishing beyond peradventure the precise "order" the accused is claimed to have violated. When a formal written order is entered, there can be no doubt what

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[12] It again bears mention that there is nothing in the Congressional purpose in utilizing 18 U.S.C. §401 as a limitation on the federal contempt power that would limit the intended narrow construction to only criminal §401 actions.

the judge has said. Nor can there be any question that the accused has been advised precisely of what the court has declared.[13]

Most importantly, the requirement of a formal written order serves to advise the recipient that the requisite conduct is unequivocally demanded and is more than a mere hope, desire, expectation, request or other such wish. Only in this fashion is the accused put on notice that non-compliance will result in more than disappointment to the court, it may result in contempt proceedings and incarceration. Contrary to the implication of the Court of Appeals, an attorney who defeats a mere judicial expectation, but does not disobey a formal order, is not in violation of 18 U.S.C. §401.[14]

Similarly, the Sixth Circuit's opinion that Petitioner violated 18 U.S.C. §401(3) by sending Mr. Swickle in his stead raises an important and recurring question of federal practice. Other Courts have reached the contrary result, concluding that an attorney who is expected to himself be present in court has fulfilled his obligation by obtaining the presence of an associate. See *In re Marshall*, 423 F.2d 1130 (5th Cir., 1970); *United States* v. *Delahanty*, 488 F.2d 396, 399-400 (6th Cir., 1973). The state courts have generally taken the same approach as *Marshall* and *Delahanty*, even where the substitute fails to appear, *Litmus* v. *McGregor*, 381 So.2d 757 (Fla. App. 1980); *Inniss* v. *Municipal Court*, 42 Cal. Rptr. 594 (1965).

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[13] By way of contrast, in the instant case there is no way of knowing whether in the process of verbally relating the message from Judge Aldrich to her clerk, to Judge Howard's clerk, to Petitioner, the imperative which Judge Aldrich apparently sought to convey was accurately delivered.

[14] Judicial expectations may be of infinite varieties. A judge may expect pre-trial briefs or may expect to receive proposed jury instructions prior to the selection of the jury. He may expect the parties to exhaust settlement negotiations on their own or to refer to the court clerk by surname. Ideally, all such expectations would be fulfilled. However, the failure to fulfill expectations which have not been expressed in a formal mandate is simply not contempt within the meaning of the contempt statute.

The Sixth Circuit's construction of 18 U.S.C. §401 is inconsistent with that of other federal courts. As a result, whether one is deemed in violation of 18 U.S.C. §401 (a federal statute intended to have uniform application), hinges on where the conduct in question occurs. This timely and important question of federal practice should be considered by this Court.

III. CERTIORARI SHOULD BE GRANTED TO CONSIDER THE COURT OF APPEALS CONSTRUCTION OF 18 U.S.C. §401(1) AS RENDERING AN ATTORNEY LIABLE IN OHIO FOR PURPORTED MISREPRESENTATIONS MADE IN MARYLAND BY AN ASSOCIATE, WITHOUT THE PARTICIPATION OF THE ALLEGED CONTEMNOR.

The contempt power conferred by 18 U.S.C. §401(1) does not extend to all "misbehavior", but only that limited class of "misbehavior" which is "in [the Court's] presence or so near thereto as to obstruct the administration of justice". There is no allegation that Baun's call from Baltimore to the clerk in Cleveland was "in [the Court's actual] presence". Thus, the critical issue is whether that conduct falls within the "so near thereto as to obstruct the administration of justice" language of the statute.

The leading case on point is *Nye* v. *United States*, 313 U.S. 33 (1941). In *Nye*, the Defendant, an attorney who represented the defendant in a wrongful death suit, was charged with contempt for having induced the father of the deceased (a feeble-minded man) to dismiss the wrongful death suit through the use of intoxicants. This Court was called upon to construe the statutory language "so near thereto" as used in the contempt statute:

> "The question if whether the words 'so near thereto' have a geographical or causal connotation. Read in their context and in the light of their ordinary meaning, we conclude that they are to be construed as geographical terms". *Nye* 313 U.S. at 48.

The Court recognized that the conduct in question was "misbehavior" and tended to "obstruct the administration of justice". Even so, the Court made it clear that a contempt conviction under this statute could not stand without the added element that the behavior was in physical proximity of the Court:

> "It is not sufficient that the misbehavior charged has some direct relation to the work of the court. 'Near' in

> this context, juxtaposed to 'presence', suggests physical proximity not relevance. . . . There may, of course, be many types of 'misbehavior' which will 'obstruct the administration of justice', but which may not be 'in' or 'near' to the presence of the court [which are not violations of the contempt statute]" *Nye*, 313 U.S. at 49-50.

Noting that the "acts complained of took place miles from the District Court" (*Nye*, 313 U.S. at 52), this Court held that the acts were not in the "presence" of the Court or "so near thereto" so as to fall within the predecessor statute to 18 U.S.C. §401(1). Thus, it was held, as a matter of law, that such conduct did not constitute a statutory contempt.

Subsequent cases have reaffirmed and applied the principles of *Nye*. In *Schmidt* v. *United States*, 124 F.2d 177 (6th Cir., 1941), the Sixth Circuit held that the filing of an affidavit in the clerk's office was *not* "in the court's presence" or "so near thereto" as to come within the contempt statute. In a similar vein, the First Circuit held in *Farese* v. *United States*, 209 F.2d 312 (1st Cir., 1954) that threats made by a lawyer to the wife of a witness in the corridor outside the courtroom did not constitute a statutory contempt for lack of the "presence" or "so near" element. *In re Stewart*, *supra*, 571 F.2d at 966, likewise held that conduct in the corridor was not subject to §401(1).

In sustaining the contempt finding, the Sixth Circuit construed the "so near" language of §401(1) in a fashion inconsistent with *Nye*, *Schmidt*, *Farese* and *Stewart*. This Court should give full consideration to the erosion of the principles of *Nye* and the split of authority in the Court of Appeals.

Moreover, it was Petitioner, Leonard Jaques, who was found in contempt for the Baun telephone call. There is no evidence that Jaques participated in the call in any fashion. There is no proof that he requested to Baun to call, or even that he knew Baun would call (to say nothing of the absence

of proof of advance knowledge of the representations which might be made during the conversation). In finding Petitioner in contempt, the lower courts necessarily construed the statutory language as providing for vicarious contempt liability.

The Court of Appeals pointedly addressed the issue of vicarious contempt liability in *North American Coal Corp.* v. *Local Union*, 497 F.2d 459 (6th Cir., 1974). The cited case involved the trial judge's efforts to hold in contempt the local officials of a union whose members had violated a no-strike order. The contempt citation was reversed for the lack of evidence that the individual officials had encouraged the contumacious conduct (497 F.2d at 465). The Sixth Circuit also addressed the question of whether §401(1) permitted a finding of vicarious contempt liability:

> "[S]uch a charge must be based on *sworn testimony*, followed by findings of fact by the District Judge. Here, dissimulation on the part of the local union officers was not even suggested, must less testified to or made the subject of judicial finding. *And contrary to the expressed view of the District Judge, there is simply no such thing as vicarious liability of an individual of criminal contempt*" (497 F.2d at 465, emphasis supplied).

As is apparent, the decisions in this case and *North American Coal Corp.* are irreconcilable. The inconsistency should be resolved by this court.

In sum, the questions presented are of substantial importance. They are questions which have divided the lower courts. This case involves the congressional intent to severely circumscribe the exercise of the contempt power and the historical abuses which moved Congress to so act, set against the modern zest for the imposition of sanctions

on attorneys. The questions presented warrant the attention of this Court.

Respectfully submitted,

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

LEONARD C. JAQUES,
Petitioner,

-vs-

HON. ANN ALDRICH, United States District Court Judge for the Northern District of Ohio, Eastern Division, and REISS STEAMSHIP COMPANY,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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MERRITT, Circuit Judge. In this action, Leonard Jaques, an attorney, appeals from an order by District Judge Ann Aldrich holding him in contempt for his failure to appear before Judge Aldrich on the first day of trial in an admiralty case in which he represented the plaintiff, Ali Ahmed. The District Judge found that Jaques' failure to appear was unjustified. She ordered Jaques to pay the government's cost of compensating the 22 person venire panel called to sit on the trial date and to reimburse opposing counsel's hotel and attorneys fees, thereby assessing a compensatory fine totalling approximately $1800. We conclude that the District Court's action was an appropriate and moderate response to Jaques' provocative conduct. For the reasons stated below, we affirm.

I.

Leonard Jaques represented the plaintiff, Ali Ahmed, in an admiralty action before District Judge Aldrich in Cleveland, Ohio. As a courtesy to Jaques and his client, the District Court on August 1, 1983, scheduled a firm trial date of October 24, 1983. On October 19, Jacques called and requested that the trial date be moved back one day because he would be in Baltimore, Maryland, in a trial before Federal District Judge Howard. The District Court granted this request. However, on Monday, October 24, the District Court received a call from Judge Howard's office informing the court that the trial in Baltimore would not end until Tuesday, October 25, and so Judge Aldrich again rescheduled trial to begin on Wednesday morning, October 26. Her clerk called Judge Howard's office and left a message for Jaques to appear for trial in Cleveland on Wednesday morning.

As six o'clock on Tuesday evening, the evening before the trial was set to begin, Jaques' associate Gary Baun called the District Court and, according to Judge Aldrich, informed the court that Jaques could not be in Cleveland on Wednesday because he was required to be in Baltimore when jury in-

structions were delivered in Judge Howard's courtroom on that same day. In fact, Jaques had been excused on Tuesday afternoon by the court in Baltimore so that he could appear for trial in Cleveland on Wednesday morning. At Judge Aldrich's request, another associate of Jaques', Robert Swickle, appeared in his place on Wednesday.

Settlement negotiations were undertaken on Wednesday morning, but these became stalemated. Swickle explained that he had been "pressed in for this" and that no further progress could be made until Jaques spoke with Ahmed, since Ahmed was really Jaques' client and not Swickle's. However, when Judge Aldrich called Baltimore in an attempt to reach Jaques, Judge Howard told her that he had excused Jacques at four o'clock Tuesday afternoon so that Jaques could appear in her courtroom in Cleveland on Wednesday. Returning to the settlement negotiations, Judge Aldrich admonished Swickle for the wasted expense in calling in the venire panel and having opposing counsel appear, and for Jaques' apparent misrepresentation to two federal judges that he was in the other's courtroom when in fact he was in neither. She told Swickle that after the trial, she would expect Swickle, Baun and Jaques to explain this sequence of events or else face sanctions.

On November 2, 1983, the District Court ordered Baun, Swickle and Jaques to appear and show cause why they should not be found in contempt under 18 U.S.C. § 401 for Jaques' failure to appear on October 26 and for misrepresenting Jaques' whereabouts. A hearing on the show cause order was held on December 22, 1983, at which Jaques represented himself and his associates. Throughout most of the hearing, Jaques refused to reply to the court's legitimate question as to the reason for his failure to appear, and instead challenged the authority of the court to conduct the proceeding and the specificity of the show cause order. When he finally did reply, Jaques' justification for his failure to appear was that he "had the screaming itches in the crotch . . . I wasn't here because I

would have been scratching my testicles constantly if I had been here."

In a lengthy memorandum opinion, the District Court found Jaques in contempt of court under 18 U.S.C. § 401.[1] The court found that Jaques' failure to appear, especially in light of the misrepresentations made regarding his whereabouts, was punishable as misbehavior so near the presence of the court "as to obstruct the administration of justice" under section 401(1). The court also found that Jaques' conduct was punishable under section 401(3) because he had failed to comply with the court's order compelling his appearance on October 26. With the express purpose of compensating the "victims of Jaques' prevarications," the court ordered Jaques to pay a "remedial" fine equal to the cost of compensating the twenty two member venire panel plus the opposing counsel's hotel and attorney's fees for October 26, an amount totalling $1804.87.

II.

A.

Jaques contends that the District Court's order imposing sanctions must be overturned because the show cause order and the court's opinion failed to state clearly whether the contempt proceedings were civil or criminal, and that these proceedings were in fact criminal and failed to afford him the procedural due process he was constitutionally entitled to as a criminal defendant.

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[1] In pertinent part, 18 U.S.C. § 401 provides that:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as —
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; . . .
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Both civil and criminal contempt proceedings may be brought under 18 U.S.C. § 401, *United States ex rel. Shell Oil Co.* v. *Barco Co.*, 430 F.2d 998, 1000 (8th Cir. 1970), and because of the frequency with which the two forms of contempt are confused, a lower court's characterization of its proceedings is but one factor to consider in determining their true nature. *United States* v. *Powers*, 629 F.2d 619, 626 (9th Cir. 1980), citing *Lewis* v. *S.S. Baune*, 534 F.2d 1115, 1119 (5th Cir. 1976). We must look instead to the "totality of the circumstances" to determine both the proper form of proceeding and that actually used. *United States* v. *North*, 621 F.2d 1255 (3rd Cir.) (en banc), *cert. denied* 449 U.S. 866 (1980).

The District Court imposed a fine which was explicitly fashioned merely to compensate the government and the opposing counsel for the harm caused by Jaques' failure to appear, and ordered the fine paid over to the victims of his misconduct. Generally, civil contempt may be either intended to coerce future compliance with a court's order, *Shillitani* v. *United States*, 384 U.S. 364, 370 (1966), or to compensate for the injuries resulting from the noncompliance. *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); TWM *Manufacturing Co.* v. *Dura*, 722 F.2d 1261, 1273 (6th Cir. 1983). Here, the District Court not only stated that the purpose of Jaques' fine was remedial and compensatory, but fashioned the fine so as to do no more than compensate the injured parties for their actual damages. These facts show that the contempt proceedings were plainly civil. *McCrone* v. *United States*, 307 U.S. 61, 64 (1939); *Perfect Fit Industries* v. *Acme Quilting Co.*, 673 F.2d 53, 57 (2d Cir.), *cert. denied* 459 U.S. 832 (1982). Jaques was therefore not entitled to the procedural protections afforded criminal defendants.

Moreover, no prejudice to Jaques resulted from the District Court's failure to specify whether the proceedings were civil or criminal. The show cause order sent long in advance of the hearing clearly indicated the factual basis of the charge

against Jaques. That order was sent on November 2, 1983, well before the December 22 hearing. At the hearing, Jaques had a full and fair opportunity to explain his failure to appear. Instead, he referred to the hearing itself as an "indignity to counsel." He then degraded his profession and insulted the court by stating that he was absent because "I would have been scratching (my) testicles constantly if I had been here." Jaques was afforded procedural safeguards well exceeding the minimum of notice and a reasonable time to prepare a defense held to apply in all contempt proceedings in *United States* v. *Hawkins*, 501 F.2d 1029, 1031 (9th Cir.), *cert. denied* 419 U.S. 1079 (1974), and we find no merit in his claim that he was denied due process.

The actions taken by the District Court find additional and independent justification in 28 U.S.C. § 1927[2], which authorizes the court to require an attorney personally to pay the "excess costs, expenses and attorneys' fees reasonably incurred" when the attorney "multiplies the proceedings . . . unreasonably and vexatiously." The court did precisely what is authorized by this statute, and the fact that the statute was not explicitly relied upon does not rob the court's order of its validity. Indeed, the District Court was personally familiar with the circumstances surrounding Jaques' failure to appear, and expenses and fees could therefore have been assessed without holding a hearing, since the usual method of handling factual issues under section 1927 is by affidavit. *North American Foreign Trading Corp.* v. *Zale Corp.*, 83 F.R.D. 293, 298 (S.D.N.Y. 1979). We affirm the actions of the District Court under the authority of this statute.

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[2] 28 U.S.C. § 1927 provides that:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

B.

Jaques also contends that there is insufficient evidence supporting the District Court's findings that he violated an order to appear for trial and misrepresented his whereabouts and the reason for his failure to appear. In considering this contention, we note at the outset that since the contempt proceeding was civil and remedial in nature, Jaques' intent in disobeying the order to appear is irrelevant to the validity of the contempt finding, *McComb* v. *Jacksonville Paper Co.*, 336 U.S. at 191, and the clear and convincing evidentiary standard applied to the proceeding. *NLRB* v. *Decaturville Sportswear Co., Inc.*, 518 F.2d 788, 790 (6th Cir.), *cert. denied* 423 U.S. 913 (1975). *See also NLRB* v. *Blevins Popcorn Co.*, 659 F.2d 1173, 1183-84 (D.C. Cir. 1981). Thus, the District Court must be upheld unless the finding that Jaques violated an order to appear is clearly erroneous.

The record discloses to the contrary that Jaques was under a formal order to appear on October 25, and the fact that the District Court orally continued trial until October 26 to accommodate Jaques' schedule did not somehow make the order to appear on October 26 insufficiently formal and clear. Moreover, statements by Jaques and his associates belie any contention that he did not feel bound by a formal order to appear. In producing his "medical" excuse at the show cause hearing, Jaques stated that "I was in Baltimore trying a lawsuit and on Tuesday, *before we were to be here*, closing arguments finished up. I had nothing else and I had every intention to come here." (Emphasis supplied). In proceedings before the court on October 26, Swickle explained that settlement negotiations would be furthered if Jaques could speak to the client because "Mr. Jaques was handling the case." Finally, the court was told by Judge Howard on October 26 that "Mr. Jaques had represented to Judge Howard that he had to be in Cleveland this morning." The evidence

clearly supports the District Court's finding that Jaques violated an order to appear of which he was well aware.[3]

Accordingly, the judgment of the District Court is affirmed. Double court costs are assessed against appellant. The Clerk is instructed to send a copy of this opinion to the President of the Michigan Bar Association and to the President of the Detroit Bar Association so that those Associations may consider disciplinary action against Jaques for his behavior.

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[3] While the order to appear on October 26 was apparently not recorded by the District Court, this lack of formality does not affect the validity of the contempt proceeding, because there is sufficient evidence showing that Jaques knew of the order, and because the proceeding was civil and not criminal. In *In Re Lamarre*, 494 F.2d 753, 758 (6th Cir. 1974), this Court held only that for an order to be enforced by criminal contempt proceedings, it must be clear and definite and actually entered upon court records.

WELLFORD, Circuit Judge, concurring. I fully adopt the recitation of the factual circumstances applicable to this regrettable instance of at best thoughtless and boorish behavior on the part of an attorney in the presence of the district judge and/or in respect of proceedings then pending before her. I concur in Judge Merritt's conclusion that the contempt proceedings in this case, although not clearly delineated, were essentially civil in nature, and that Jaques was not prejudiced by the district court's failure of specification. I further concur in the conclusion that Jaques received a full and fair hearing with reasonable opportunity to explain his previous failure to appear. On this basis I join in the judgment of affirmance.[1]

While I find the rationale logical pertaining to finding additional justification for the court's action in 28 U.S.C. § 1927, I decline to join that part of the opinion. This court previously (and I believe unfortunately) limited the application of that section in *United States* v. *Ross*, 535 F.2d 346 (6th Cir. 1976). Another court has found that conduct akin to studied disregard for orderly processes of justice be the necessary predicate for imposition of costs thereunder. *Kiefel* v. *Las Vegas Hacienda, Inc.*, 404 F.2d 1163 (7th Cir. 1968), *cert. denied*, 395 U.S. 908 (1969). While Jaques disregarded the procedures established by Judge Aldrich, I am not sure that his actions "vexatiously" multiplied the proceedings within the meaning of that statute.

I join in the conclusion that clear and convincing evidence, if required in this type of proceeding, was present to support the district court's findings and imposition of civil sanctions.

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[1] The particular offensive remarks pointed to by Judge Merritt made to Judge Aldrich may themselves have been a basis for the Judge to find that Jaques was persisting in his conduct essentially contemptuous of the Judge and the orderly processes of the court.

HILLMAN, District Judge, dissenting:

Although appellant's conduct should be an embarrassment to himself, members of his firm and the trial bar, I respectfully dissent. The majority concludes that the contempt judgment below should be affirmed since it was civil in nature. Consequently, according to the court, the rights and protections guaranteed to those charged with criminal contempt are not applicable to appellant. The proceedings below, which were commenced after the case was settled, were pursued by the district judge for one purpose only, and that was to punish appellant for his professional misconduct and to vindicate the authority of the court. This is classic criminal contempt. *Civil and Criminal Contempt in Federal Courts*, 17 F.R.D. 167, 178 (1955).

The nature of contempt proceedings depends primarily upon the purpose for which the proceedings are brought. *In re Stewart*, 571 F.2d 958, 963 (5th Cir. 1978). *See also Gompers* v. *Buck Stove & Range Co.*, 221 U.S. 418, 441 (1911). The purpose of civil contempt is remedial: "the penalty serves to enforce compliance with a court order or to compensate an injured party." *In re Stewart*, 571 F.2d at 963. The purpose of criminal contempt is punitive: "the penalty serves to vindicate the authority of the court and does not terminate upon compliance with a court order." *Id.* As stated by the Seventh Circuit in *Pabst Brewing Co.* v. *Brewery Workers Local Union No. 77*, 555 F.2d 146, 149 (7th Cir. 1977):

> "The feature that distinguishes criminal from civil contempt is that the purpose of the former is primarily to punish for actions already taken while the latter intends to coerce for prospective compliance. . . . The test to determine the nature of the contempt is to ask '. . . what does the court primarily seek to accomplish by imposing sentence?"

In the instant case, appellant found himself in a predicament not uncommon to the trial bar. He was required to

be in two courts 500 miles apart on the same day. His failure to extricate himself from this dilemma in a professional manner resulted in his being found guilty of contempt of court. Specifically, the district judge held that appellant (a) failed to appear in Cleveland for trial as ordered, and (b) told two different federal judges he was appearing before the other, when in fact, he was appearing before neither.

In her Memorandum and Opinion, the district judge states:

> "[T]his court finds Jaques' rude and irresponsible failure to appear on October 26, 1983 is clearly punishable as, *criminal* contempt under 18 U.S.C. § 401(3) . . . . Jaques unabashed prevarication regarding his whereabouts is punishable under § 401(1). Unfortunately, the First Circuit was unquestionably correct when it stated: 'Merely punishing the delinquent attorney does not solve the problem for the court whose calendar was disrupted. [*United States* v. *Lespier*, 558 F.2d 624, 628 (1st Cir 1977)].
>
> Allowing Jaques to escape all sanctions after such misbehavior would, however, encourage chaos, reward reprehensible tactics, and breed contempt for court scheduled proceedings.
>
> There can be no doubt that Jaques deliberately and recklessly disregarded his obligation to the court. Such intentional disrespect is sanctionable by *criminal* contempt."

Memorandum and Opinion, p. 19. (Emphasis added). For these reasons, the district judge found Jaques guilty of contempt under 18 U.S.C. § 401(1) and § 401(3). Jaques was ordered to pay to the Clerk of the Court the costs of compensating the venire panel and to reimburse defendant for its counsel's hotel expenses and attorney fees incurred on October 26, 1983.

Although the district judge stated that this fine was "remedial," this characterization is not dispositive. *United States*

v. *Powers*, 629 F.2d 619, 626 (9th Cir. 1980). The contempt proceedings were not brought by an injured party seeking reimbursement for costs and expenses, nor were they intended to coerce prospective compliance. The matter was prosecuted by the district judge after the *Ahmed* case had already been settled. The fine, a portion of which was to be paid directly to the Clerk of the Court, was imposed as punishment for past misconduct. Its purpose was to vindicate the authority of the court in the face of what it perceived to be willful and reckless disregard for the court's order. Accordingly, I conclude that the contempt proceedings were criminal in nature.

Nevertheless, it is apparent that the district judge was unclear herself whether she was citing appellant for criminal or civil contempt. The initial order to show cause referred to "sanctions," yet at the hearing, no statement was made by the court clarifying whether the contempt was criminal or civil, despite appellant's request to know the specifics of the charge he was facing. The trial court's memorandum and order compounds the confusion. Her opinion retained the civil case caption (indicative of civil contempt), but the court specifically, and for the first time, used the term "criminal contempt" in describing appellant's conduct. Thus, although I am convinced that the proceedings were for criminal contempt, the record is confusing on this point, as evidenced by this panel's inability to agree whether it was civil or criminal.

A lawyer has a right to know from the very beginning whether he is being charged with criminal or civil contempt. The distinction is vital. Criminal contempt is a crime. If in fact the charge was criminal contempt, appellant was entitled to notice and hearing, right to counsel, right to bail, proof beyond a reasonable doubt, presumption of innocence, privilege against self-incrimination, and in some instances, not only a right to a jury trial, but the right to a hearing

before another judge.[1] While this circuit apparently has not addressed the question, the Fifth Circuit has repeatedly held that reversal is required when the record does not clearly disclose that the proceedings were civil or criminal. *See, e.g., Skinner* v. *White*, 505 F.2d 685, 688-89 (5th Cir. 1974); *Cliett* v. *Hammonds*, 305 F.2d 565, 570 (5th Cir. 1962). With trial judges currently being urged to use "sanctions"[2] to control discovery abuses and eliminate other delaying tactics, one can expect to see more contempt cases on appeal. The Fifth Circuit rule provides clear and unambiguous guidelines to the district judges and its adoption in this circuit would prevent future procedural confusion of the type evidenced by this case.

In addition, the contempt judgment cannot stand since the trial judge erroneously concluded that the order to show cause shifted to appellant the burden of disproving the charges. "It's not the court's burden to put on the evidence." (Tr. 12/22/83, p.30). Appellant was convicted because of the court's belief that his explanations were not convincing. In *North American Coal Corp.* v. *Local Union*, 497 F.2d 459, 466 (6th Cir. 1974), this court held the issuance of an order to show cause does not relieve the party alleging the contempt of the burden of proving the charge. No such proof can be found in this record. There was no sworn testimony and no witnesses, only a tumultuous exchange between appellant and the judge. The judge's "findings" were based on *ex parte* accounts related to her by her law clerk and the district court in Baltimore. There can be no question she was incompetent as a witness to render such testimony. *See* Fed. R. Evid. 605 (presiding judge may not testify in that trial as

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[1] The criminal contempt procedures are set forth in Fed. R. Crim. P. 42.

[2] Burger, 61st Annual Meeting of the Am. Law Institute, May 15, 1984; Burger, 1984 Year-End Report on the Judiciary.

a witness); Fed. R. Evid. 602 (requirement of personal knowledge); Fed. R. Evid. 802 (hearsay).

Likewise, despite appellant's failure to show up for trial in Cleveland, it is undisputed that his associate was present at the commencement of the proceedings. Although a dispute exists over the associate's exact role and authority in appellant's absence, an attorney is not guilty of contempt for non-appearance where an associate appears in his place. *United States* v. *Delahanty*, 488 F.2d 396, 399-400 (6th Cir. 1973).

In any event, even if the proceedings were civil in nature, I cannot agree that there is clear and convincing evidence that such sanctions were warranted under either 18 U.S.C. § 401(3) or § 401(1). Section 401(3) authorizes the court to impose sanctions for "disobedience or resistance to its lawful writ, process, order, rule, decree or command." Here, the district judge concluded that sanctions were warranted under this statute because Jaques failed to appear in court on October 26, 1983. This conduct, however, cannot be sanctioned under section 401(3), absent an unequivocal order requiring Jaques to be present. I find no such order in the present case.

The trial judge scheduled trial to begin on October 24, 1983. This order, however, could not be the basis for the contempt charge because it was directed to appellant's associate, not Jaques, and was rescinded by Judge Aldrich at the request of Jaques' office because the trial in Baltimore was expected to continue until October 25, 1983. The only other "order" issued was a telephone message given by Judge Aldrich's clerk to Judge Howard's secretary in Baltimore, stating that Jaques would be "expected" to appear for trial in Cleveland on October 26, 1983.

In *In re LaMarre*, 494 F.2d 753 (6th Cir. 1974), this court addressed the question whether such a message constituted an order under 18 U.S.C. § 401(3). In *LaMarre*, an insurance adjustor was repeatedly advised by telephone that the

trial judge desired his attendance at settlement discussions. The District Court held him in contempt for refusing to attend, and this court reversed, holding that a request by telephone does not constitute an order under section 401(3):

> "[The] cases hold or imply that for an 'order' or 'command' to be enforced by criminal contempt proceedings, it must be clear and definite and 'entered' upon the record or records of the court. These standards strongly suggest that such order be permanently preserved for review. This normally means a written order issued by the court and personally served upon the alleged contemner. Such an order, however, may likewise be enforceable if entered in open court in the presence of the person concerned or with his knowledge clearly proved."

494 F.2d at 758.

Likewise, under similar facts, the Fifth Circuit held in *In re Stewart*, 571 F.2d 958, 966 (5th Cir. 1978):

> "[A]n oral 'message' such as this, not stated in open court where it could be taken down by a court reporter, addressed to a person not before the court, never entered upon the records of the court, and relayed . . . through a person without official status, is not an 'order' or 'command' within the meaning of subsection (3)."

Judges and lawyers work in a contentious environment under great strains and pressures. Our system presumably thrives on combative advocacy. At the same time, the contempt power of the court is designed to protect the integrity of the court. Thus, when this awesome power is exercised by a judge, no doubt should exist concerning the interpretation of the order alleged to have been disobeyed. This is the teaching of *LaMarre*, regardless of whether the nature of the proceedings is civil or criminal. In either case, an unequivocal order is required to put the contemner on notice that severe

sanctions may be imposed for non-compliance. Since no such order was issued in this case, sanctions could not be imposed under section 401(3).

Finally, as a matter of law, the alleged falsehood contained in the telephone call from appellant's associate in Baltimore to the judge in Cleveland does not constitute a violation of 18 U.S.C. § 401(1). First, the call was not made by appellant himself, but by his associate. Absent proof that appellant authorized or ratified the allegedly false representation, appellant cannot be held vicariously guilty of contempt. *North American Coal Corp.*, 497 F.2d at 467. Second, the associate's call from Baltimore to the clerk in Cleveland was not "in the court's presence or so near thereto as to obstruct the administration of justice." The Supreme Court has specifically held that this language requires the contemptuous conduct to occur in physical proximity to the court. *Nye* v. *United States*, 313 U.S. 33 (1941). In *Nye*, the defendant, an attorney who represented the defendant in a wrongful death suit, was charged with contempt for having induced the father of the deceased to dismiss the wrongful death suit through the use of intoxicants. Construing the statutory language "so near thereto" as used in the contempt statute, the Supreme Court stated:

> "The question is whether the words 'so near thereto' have a geographical or a causal connotation. Read in their context and in the light of their ordinary meaning, we conclude that they are to be construed as geographical terms."

Nye, 313 U.S. at 48. *See also Schmidt* v. *United States*, 124 F.2d 177 (6th Cir. 1941); *Farese* v. *United States*, 209 F.2d 312 (1st Cir. 1954). Here, the conduct in question occurred in Baltimore. Under the cited case law, this does not constitute a violation of 18 U.S.C. § 401(1), as the purported misbehavior was not in the "presence" or "so near thereto" of the Cleveland judge as the statute requires.

In conclusion, while appellant's conduct and language at the contempt hearing itself may be a basis for imposing sanctions, the contempt citation presently before this court was not warranted under 401(1) or 401(3). Likewise, I concur with Judge Wellford that the district court's judgment cannot be supported by *ex post facto* reliance upon 28 U.S.C. § 1927. *United States* v. *Ross*, 535 F.2d 346 (6th Cir. 1976).

Accordingly, I respectfully dissent from the decision to affirm the judgment of contempt entered by the District Court. I do, however, concur in that part of the majority opinion that refers appellant's conduct at the show cause hearing to the appropriate Bar Association for review and possible disciplinary action.[3]

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[3] Since appellant is licensed by the State of Michigan, the appropriate body to look into this matter is the Michigan Attorney Grievance Commission, 600 Marquette Building, 243 West Congress Street, Detroit, MI 48226.

Memorandum and Order

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALI S. AHMED
Plaintiff

vs. Civil Action No. C80-506

REISS STEAMSHIP COMPANY
Defendant

ALDRICH, J.

MEMORANDUM AND ORDER

Attorney Leonard Jaques' failure to appear for trial before this Court on October 26, 1983, and the misrepresentations surrounding his failure to appear, compel the imposition of sanctions in this case.

On October 26, 1983, attorney Leonard Jaques failed to appear before this Court for trial as scheduled. An associate of his represented that Jaques was in Baltimore, Maryland appearing before the Honorable Joseph C. Howard. When this Court attempted to contact Jaques by phone, Judge Howard advised this Court that Jaques was not appearing in Judge Howard's courtroom, but had been released the previous day to allow him to appear in Cleveland. In essence, Jaques told two different federal district court judges that he was appearing before the other, when in fact Jaques was appearing before neither. After notice and a hearing, this Court finds that Leonard Jaques has failed to show cause why sanctions should not be imposed for violations of 18 U.S.C. §401(1) and §401(3).

FACTS

Jaques represented the plaintiff, Ali S. Ahmed, in a civil admiralty proceeding before this Court. At Jaques' request, advance scheduling arrangements were made to insure

Jaques and his client a firm trial date. Guaranteeing a firm date in civil trials in a substantial departure from this Court's customary practice. The press of criminal trials which must be expedited due to the Speedy Trial Act compels this Court to typically schedule civil cases only as back-up trials to criminal cases. Such was this Court's calendar in the fall of 1983.

As a courtesy to Jaques and his client, this Court departed from its standard scheduling procedure and on April 13, 1983 advised Jaques of a trial date of October 4, 1983; on August 1, 1983, this Court set a firm trial date of October 24, 1983. This accommodation was made because Jaques informed this Court that his client would be travelling from Yemen to attend the trial. Jaques further advised that a number of witnesses were seamen on various vessels who would have to be brought in from their ships in order to testify. The Court was persuaded that Jaques' case presented unusual circumstances which warranted exceptional scheduling arrangements and the October 24, 1983 trial date was guaranteed.[1] On the designated date, and at repeatedly rescheduled times thereafter, the Court and twenty-two veniremen stood ready and waiting to proceed while Jaques and his associates delayed the Court and its trial calendar.

On Wednesday, October 19, Jaques' office informed this Court that a trial in which Jaques was appearing before the Honorable Joseph C. Howard in Baltimore[2] would exceed

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[1] Ahmed's case, filed in April of 1980, was three years old at the time these dates were set. After the lapse of so much preparation time, this Court believed that Jaques was sincere in representing the posture of his witness list. Shortly before the trial date, however, Jaques submitted proposed voir dire questions on behalf of his client, and the Court learned from them that, although Ahmed is a native of Yemen, he immigrated to this country in the mid 60's, is a naturalized citizen, and now lives in Detroit. In addition, the Court learned that Jaques did not intend to call any seamen, other than Ahmed, as witnesses at trial.

[2] *Estate of Walter Larkins v. Farrell Lines, Inc.*, No. JH82-2645 went to trial on October 17, 1983. It had been scheduled for that date since mid-July.

its projected five day duration and would not be completed until Monday, October 24, 1983. Consequently, at Jaques' request, this Court continued Ahmed's trial until Wednesday, October 26, 1983, and scheduled the pretrial for October 25, 1983 at 4:00 p.m.

On Monday, October 24, 1983, Judge Howard's law clerk called this Court to advise that their trial would not be completed that day, but would be submitted to the jury on Tuesday, October 25. This Court then left word with Judge Howard's chambers and with Jaques' Detroit office that Jaques would be expected for a pretrial conference followed immediately by trial, beginning Wednesday, October 26 at 9:30 a.m. No response to the contrary was received until Tuesday evening at 6:00 p.m.[3] when Jaques' associate, Gary Baun, called and said that Jaques could not be in Cleveland for trial on Wednesday because his presence was necessary when the jury instructions were delivered in Judge Howard's courtroom on Wednesday morning. This Court's suggestion that Jaques' associate stay for the jury instructions and Jaques appear in Cleveland on Wednesday was rejected.

At the Court's request, Baun arranged to send Robert Swickle on Jaques' behalf with Ali Ahmed to Cleveland to meet with the Court and defense counsel[4] for a pretrial conference and settlement negotiations. Baun explicitly represented that Swickle would have full authority to settle the case. Settlement discussions stalemated Wednesday afternoon when Swickle told the Court that no further progress could be made until Ahmed spoke to Jaques. It became clear that, despite Baun's representation that Swickle had

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[3] At this hour, it was too late for the Court to advise the veniremen not to attend the next day, as is the Court's custom when a scheduled trial is cancelled or postponed.

[4] Defendant's attorney, Robert Dunn flew to Cleveland from Detroit on Tuesday evening in anticipation of trial on Wednesday morning. Before leaving Detroit, he checked with the Court periodically to be sure Jaques had not asked for another continuance. He last checked with the Court by phone from the airport at 4:05 p.m. before boarding a plane.

authority to settle, he really had no power to allow the case to be settled unless Ahmed spoke with Jaques.

Hoping to resolve the stalemate, this Court called Judge Howard in an attempt to reach Jaques. He was not appearing before Judge Howard, nor had he made an appearance at all that day. Judge Howard said he had excused Jaques at 4:00 p.m. the previous evening so Jaques could appear before this Court on Wednesday morning. Jaques' associates were present while Judge Howard delivered the jury instructions Wednesday morning, but Jaques never made an appearance. Judge Howard believed Jaques was in Cleveland and this Court believed Jaques was in Baltimore. Apparently, he was neither. Settlement discussion could not proceed and negotiations were stymied because of Jaques' unavailability. The Court instructed Swickle to locate Jaques and advise the Court by 4:45 p.m. whether it would be necessary to recall the jury for Thursday.

On Thursday, Jaques again failed to appear before the Court in Cleveland, instead calling from Detroit at 4:15 p.m. to advise that his client, Ahmed, rejected defendant's offer of $100,000.00. Jaques was instructed to appear for trial at 9:00 a.m. Friday, October 28, 1983.

Following his tardy arrival on Friday, Jaques informed the Court that he was scheduled to appear before the Fifth Circuit Court of Appeals for oral argument on Monday, October 31, 1983. At his request, the Court agreed that, at the end of the day, it would not reconvene the trial until Tuesday afternoon. The jury was empaneled and, during the recess prior to opening statements, Jaques presented Reiss Steamship with an offer to settle the case for a cash award of $125,000.00. The parties knew, from events of the previous two days, that the five hour time difference between Cleveland and defendant's London office prevented Reiss Steamship's attorney from immediately determining if the counteroffer was acceptable. Consequently, the trial was

adjourned for the weekend. The parties advised the Court by phone on Monday, October 31, 1983, that they had settled their dispute for $125,000.00. Leonard Jaques avoided any further appearance before this Court.

Having advised Swickle, on the record, on October 26 that he and Jaques and Baun would be called upon at the conclusion of the case to explain their absence on Wednesday and the discrepancy between their version of their courtroom responsibilities and Judge Howard's version, this Court issued notice on November 2, 1983 to Leonard Jaques, Gary Baun and Robert Swickle ordering them to appear for a hearing on December 23, 1983. A transcript reciting the essential facts which would be the focus of inquiry at the hearing was docketed November 15, 1983 and issued to Jaques.

At the hearing on December 23, 1983, Jaques suggested that this Court had not specifically advised him of the reason for the hearing and the focus of its inquiry. This Court finds that Jaques was advised. In a hearing in chambers on October 26, 1983, the day Jaques failed to appear, Jaques' associate, Robert Swickle, represented to the Court that Jaques was in trial in Baltimore. (Transcript of October 26, 1983, ("T.I.") p.2). This Court then advised Swickle that the trial judge in Baltimore had personally informed this Court to the contrary; and this Court intended to pursue the question of Jaques' nonappearance at the conclusion of the case.

> During the lunch break Judge Howard, who is presiding at the trial in Baltimore, advised me that he had made special arrangements yesterday afternoon for Mr. Jaques to leave Baltimore shortly after 4:00 o'clock because Mr. Jaques had represented to Judge Howard that he had to be in Cleveland this morning, and Mr. Jaques has not in fact been at the trial in Baltimore during any part of today's proceedings.

It is 3:30 in the afternoon and Mr. Jaques himself has put in no appearance with this Court nor has he advised this Court as to any reason why he is not here.

I want to point out to you, Mr. Swickle, that this Court takes this matter very seriously. There is a question of 22 jurors who have been here at $30 a day. We are wasting taxpayers' money, we are wasting the time of the jury, the time of this Court and I think Mr. Dunn's time and money.

I am making no judgments about what the facts as I understand them lead me to at this point. I am making no finding. I am suggesting that Mr. Jaques better have a very solid excuse as to why he is representing to two Federal Judges in two cities that he is with one or the other of them when, in fact, he is at neither place, and I do intend to pursue this after we have concluded this case. I would appreciate it if you would advise your partner of that fact.

T.I. pp. 5-6. Moreover, this Court's notice of November 2, 1983 specifically stated that the hearing would inquire into "apparent mis-behaviour related to a failure to appear before this Court as scheduled on Wednesday, October 26, 1983."

At the hearing on December 23, 1983, Jaques declined to dispute the charge that he was not in trial in Baltimore on October 26, 1983 as he led this Court to believe; and that he was not in trial in Cleveland as he led Judge Howard to believe:

MR. JAQUES: I am not answering. I am not saying anything was represented to Judge Howard. You are not cognizant and that is not before this particular body here. I make no representation. I don't believe you will ever see Mr. Jaques make any representation to this Court at all.

THE COURT: Well, I would like to know.

MR. JAQUES: You would like to know? I would like to know a lot of things about this.

THE COURT: Mr. Jaques, I simply would like to know why the representation was made to this Court that you could not be here as scheduled because you were appearing in Baltimore when I was then advised by Judge Howard that you were not in fact in Baltimore. He indicated to me that you had represented to him in Baltimore that you were in Cleveland.

MR. JAQUES: It is all very clear that I am not going to make it clear unless I get some understanding with regard to what authority —

Transcript of December 23, 1983 (T.II) p. 11.

Rather than explain his absence, Jaques tacked in another direction and attempted to allege that he was not required to appear because he was not trial counsel in the case.

THE COURT: You do not believe that if you have indicated that you are trial counsel and the trial date is set, that you have any obligation to appear?

MR. JAQUES: Judge, I was not the trial counsel here.

Id. at 17.

Jaques' testimony was in direct contradiction to his pretrial brief submitted January 7, 1983 which unequivocally states that trial counsel would be Leonard C. Jaques, of the Jaques Admiralty Law Firm, P.C. (See, Exhibit A). No other attorney was named as trial counsel in the brief, or in any amended pretrial brief submitted thereafter. Although Jaques may have said, on December 23, 1983, that he was not trial

counsel with an obligation to appear on October 26, 1983, this Court's records indicate otherwise. The representations of Jaques' associates, who protested during the period immediately preceding October 26, 1983 that the trial could not proceed in Jaques' absence, also indicate to the contrary.

> MR. SWICKLE: Basically, a face-to-face meeting, because Mr. Jaques was handling the case and I was pressed in for this, and I thought client relationships could be better maintained by Mr. Jaques and the client, which we discussed was possible, before I talked with the client at the lunch break.

T.I. p. 4.

Although on October 26, 1983 Swickle represented, on the record, that he could not proceed further in settlement negotiations without Jaques, on December 23, Swickle claimed he was prepared to try the case on that date. This representation was never made to the Court on October 26 despite the Court's persistent interest in commencing the trial. Swickle's representation at the December 23 hearing is also inconsistent with his inability to reject the defendant's settlement offer on October 26, particularly when rejection of the offer was the only logical prelude to trial.[5]

Finally Jaques elected to explain his absence in language which can, at best, be described as lacking taste and any respect for courtroom decorum:

> MR. JAQUES: I wasn't here because I couldn't be here. I was not here, Judge, because I had the screaming itches in the crotch. I was so badly in need of medical care that I had been in communication wtih my physician a lot. Judge, I wasn't here because I would have been scratching my testicles constantly if I had been here.

---

[5] Of interest is the fact that the settlement offer made on October 26 was not rejected until the following afternoon when Jaques himself called the Court.

Judge —

THE COURT: Mr. Jaques —

MR. JAQUES: Judge, do you understand that?

THE COURT: You don't have to be so graphic. You could have simply let the Court know that for medical reasons you were not going to be here, and you could have —

MR. JAQUES: Judge, it was not a medical reason that I would have been able to frame earlier. That's one thing.

THE COURT: It doesn't seem awfully difficult to me. Is there anything else?

T.II p. 29.

Jaques also submitted an undated letter from his doctor[6] which stated in part:

> . . . It has been recommendation (sic) to Mr. Jaques that because of the nature, location and symptoms of this ailment he should avoid to be in public places and mainly court appearances all of which could jeopardize his professional appearance. . . .

This Court does not question the intensity of Jaques' discomfort. What is questionable is why his affliction "was not a medical reason that I would have been able to frame earlier". Even more questionable, and objectionable, is Jaques' method of excusing himself from this courtroom by claiming he was in Judge Howard's courtroom, a fact Jaques does not dispute was undeniably false.

---

[6] Exhibit B.

FINDINGS OF FACT

Attorney Leonard Jaques was trial counsel in the civil admiralty proceeding *Ahmed v. Reiss Steamship Company*, C80-506. At Jaques' request, a firm trial date of October 24, 1983 was guaranteed, however trial did not commence on that date because, at Jaques' request, and the request of his associates, the trial date was continued on three occasions to accommodate Jaques' schedule conflict with another trial in Baltimore. On October 26, 1983, twenty-two veniremen reported for jury duty in this case, but Leonard Jaques did not appear for trial. His associate, Robert Swickle represented to the Court that Jaques was in trial in Baltimore. The Honorable Joseph C. Howard, United States District Court for the District of Maryland, personally informed this Court that Jaques did not appear before him on October 26, 1983 but had been excused on October 25 so that Jaques could appear in Cleveland before this Court. Leonard Jaques caused this Court to believe that he was appearing in trial in Baltimore when, in fact, he was not.

On October 26, 1983, this Court gave oral notice that it intended to inquire into the reasons for the misrepresentations concerning Jaques' failure to appear. On November 2, 1983 written notice was issued setting the date for a hearing on December 23, 1983. The essential facts constituting the criminal contempt charged were transcribed and reduced to writing in the transcript docketed November 15, 1983 and issued to Jaques.

CONCLUSIONS OF LAW

This Court will confine itself to considering the propriety of Jaques' conduct in light of this Court's responsibility to "protect the processes of orderly trial, which is the supreme object of the lawyer's calling". *Id.* at 13, citing *Sacher v. United States*, 343 U.S. 1 (1952), *reh'g denied*, 343 U.S. 931 (1952).

NOTICE AND HEARING

Notice of a hearing into Jaques' failure to appear was issued and the hearing proceeded in compliance with Fed. R. Civ. P. 42(b) which states in pertinent part:

> A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. . . .

In a contempt proceeding, reasonable notice of the charge and an opportunity to be heard in defense are "basic in our system of jurisprudence." *Taylor v. Hayes*, 418 U.S. 488, 498 (1974). Accordingly, on October 26, 1983,[7] this Court specifically set forth the matters into which she intended to inquire at the hearing which was subsequently noticed for December 23, 1983. At the December 23 hearing, Jaques, who elected to appear without counsel on his behalf,[8] was given full opportunity to present evidence and testimony. The hearing comported with *Taylor v. Hayes*, *supra* at 500 n.9:

> . . . all we have decided today is that a contemnor is entitled to the elementary due process protections of "reasonable notice of the specific charges and opportunity to be heard in his own behalf." . . . Nowhere do we intimate that "a full-scale trial is appropriate." . . . (citations omitted)

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[7] See Transcript of October 26, 1983 docketed November 15 and issued to Jaques.

[8] Baun and Swickle were represented by counsel; Jaques appeared as counsel for them.

STATUTE

Title 18 U.S.C. §401 provides in pertinent part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as —
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> . . .
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Contumacious misbehavior punishable under §401(1) must be willful, and must actually obstruct the district judge in the performance of judicial duties. *United States v. Thoreen*, 653 F.2d 1332 (9th Cir. 1981), *cert. denied* 102 S.Ct. 1428 (1982). Under §401(3), a party may be found in contempt for disobeying an order "only if the order is clear and definite, and the contemnor has knowledge of it." *Id.* at 1339, *citing United States v. Baker*, 641 F.2d 1311 (9th Cir. 1981).

CONTUMACIOUS MISBEHAVIOR

Misbehavior punishable under §401(1) is limited to conduct which occurs in the presence of the court "or so near thereto as to obstruct the administration of justice." Since part of the misbehavior at issue here is Jaques' failure to appear, it cannot be said that his misbehavior was in the presence of the court. However his telephonic communications on October 19, asking for a continuance, and his failure to appear on the scheduled date when he misrepresented that he was otherwise engaged before another federal judge, combine to constitute misbehavior "so near" to the presence of this Court as to fall within §401(1). The standard for obstructive misconduct is "whether the obstruction or disruption is material." *Thoreen, supra* at 1340.

There can be no doubt that Jaques' misbehavior obstructed the administration of justice. Had Jaques appeared as scheduled on October 26, 1983, trial could have commenced, or the settlement discussions could have been more than a dilatory charade intended to project to the Court the appearance of some activity toward disposition of the case. Jaques' failure to appear, and his day-to-day continuances prevented this Court from either proceeding with Ahmed's trial or scheduling a substitute matter.

Jaques' contention that he was not trial counsel and therefore had no obligation to appear cannot diminish the willfullness of his misconduct. Jaques does not dispute that he was not in Baltimore on October 26 as he led this Court to believe, and caused his associate to represent to the Court. Neither does he dispute that he was given firm notice of a trial date which required him to be before this Court on a date certain. Jaques' own telephone call on October 19 indicates that he was aware of his obligation to attend, and he was aware that the Court was continuing the trial date solely for the purpose of accommodating him. Jaques was trial counsel, had an obligation to appear, and willfully misrepresented to this Court his reason for not attending. The effect of Jaques' misrepresentation was to delay the proceedings. To delay proceedings is to obstruct the administration of justice. *In re Dellinger*, 502 F.2d 813, 816-17 (7th Cir. 1974), *cert. denied* 420 U.S. 990 (1975). However, it is not merely Jaques' failure to appear which constitutes misbehavior. This Court is persuaded by the Seventh Circuit's observation that "[t]he seriousness of the misbehavior has some bearing on whether the conduct is materially obstructive." *Thoreen, supra*, at 1340. *See also, United States v. Seale*, 461 F.2d 345 (7th Cir. 1972). While an attorney's failure to appear is always a serious matter, Jaques compounded the offense by misrepresenting the reason for his failure to appear. This Court regards such a misrepresentation as a very serious matter.

DISOBEDIENCE OF THE COURT'S ORDER TO APPEAR FOR TRIAL

There can be no doubt that this Court's trial order compelling trial counsel to appear for trial on October 24, 1983 was clear and definite. The continuances granted thereafter were extended at Jaques' and his associates' requests. Each time a continuance was granted, a specific date and time for commencement of trial was scheduled, and an entry was noted on the docket sheet kept by this Court's deputy clerk *See*, Exhibit C. Jaques' allegation that this Court elected not to proceed with trial when an attorney from his office was present mischaracterizes the events of October 26, 1983. This Court is never willing to jeopardize the interests of a litigant and his case on the merits by railroading him into trial without the attorney of his choice. *See, Morris v. Slappy*, ___ U.S. ___, 103 S.Ct. 1610, 1620-1623 (1983).

Swickle stated on the record that he had been "pressed in for this" and that Ahmed was Jaques' client. Swickle in no way represented on October 26, 1983 that he was prepared to go to trial, and despite his protestations to the contrary on December 23, 1983, it was apparent that on October 26, Swickle was not prepared to try the case. Indeed, on October 28, 1983 when Jaques finally appeared for trial and the jury was empanelled, Swickle was not in attendance and did not appear on behalf of Ahmed at all.

As trial counsel, Jaques was under an obligation to appear on behalf of his client on the date scheduled; substitution of an attorney not willing or not able to proceed to trial does not fulfill this obligation. Even if Jaques mistakenly believed in good faith that he had no obligation to appear, and that substitution of his associate would not hinder the Court, a defense of lack of intent to obstruct justice is without merit. "Proof of an evil motive or of an actual intent to obstruct justice is unnecessary." *Thoreen, supra* at 1342. Section 401(1) does not require a specific

intent; Jaques' protestation of a lack of intent to deceive the court or to obstruct justice is irrelevant. *Id.* The only intent that need be shown is that the contumacious attorney knew or should have known that his conduct exceeded the outermost limits of his proper role and hindered rather than facilitated the search for truth. *Ibid.* "An attorney's intent may be inferred if his conduct discloses a reckless disregard for his professional duty." *Ibid.*

At the hearing Jaques admitted that he did not accurately advise the Court of the reason for his inability to attend trial on October 26, 1983.

> MR. JAQUES: Judge, I am going to tell you right now what it is. I am going to tell you why I wasn't there. I don't like the indignity that you have put me through and I think it is most inappropriate for a Court to do this. But I am going to tell you why.
>
> I was in Baltimore trying a lawsuit and on Tuesday, before we were to be here, closing arguments finished up. *I had nothing else* and I had every intention to come here. But I had a problem.
>
> I did not misrepresent to anybody. I am only giving this to protect the record. *I don't expect you to place any credence on anything*, but here is this. (Emphasis supplied).
>
> * * *
>
> Judge, it was not a medical reason that I would have been able to frame earlier.

T. II pp. 28-29. However, Jaques' statement that he did not misrepresent anything is inconsistent with his representations to Judge Howard and to this Court. It is clear that Jaques knew his representations were not accurate, and that his conduct exceeded reasonable limits in face of this Court's pressing trial calendar. His conduct demonstrated a reckless disregard for his professional duty.

The First Circuit's comments regarding a similarly inconsiderate attorney's behavior are appropriate: "Our narration of these proceedings reveals conduct of counsel which merits memorialization only as an example of what the bar must avoid if courts are to function." *United States v. Lespier*, 558 F.2d 624 (1st Cir. 1977). Like the *Lespier* court, this Court finds Jaques' rude and irresponsible failure to appear for trial on October 26, 1983 is clearly punishable as criminal contempt under 18 U.S.C. §401(3). *Id.* at 628. Jaques' unabashed prevarication regarding his whereabouts is punishable under §401(1). Unfortunately, the First Circuit was unquestionably correct when it stated: "Merely punishing the delinquent attorney does not solve the problem for the court whose calendar has been disrupted." *Ibid.*

Allowing Jaques to escape all sanctions after such misbehavior would, however, encourage chaos, reward reprehensible tactics, and breed contempt for court scheduled proceedings.

There can be no doubt that Jaques deliberately and recklessly disregarded his obligation to the court. Such intentional disrespect is sanctionable by criminal contempt. *DeVaughn v. District of Columbia*, 628 F.2d 205 (D.C. Cir. 1980). An unavoidable schedule conflict caused by an unexpectedly long trial is understandable. This Court is always willing to make reasonable accommodations in those instances. This Court cannot tolerate counsel's intentional refusal to accommodate the Court after so many schedule adjustments were gladly made at his request. Jaques' attitude conveyed "the unrealistic if not contemptuous expectancy that the court, despite elaborate advance scheduling of a trial, would at the last moment subordinate the interests of all others to the personal plans of a lawyer who had not taken the smallest step of giving notice earlier . . ." *U.S. v. Lespier, supra* at 627-628. Jaques clearly had personal problems which prevented him from complying with this Court's order to appear in Cleveland on Wednesday,

October 26, 1983. He willfully deceived this Court and the court in Baltimore for unknown reasons. He did so at the expense of defense counsel's time and this Court's time and the time of a twenty-two member venire panel, who were paid at taxpayer's expense to appear for a trial which did not proceed as scheduled due to the inconsideration of one man.

This Court concludes that Leonard C. Jaques violated this Court's order to appear for trial on October 26, 1983 and is in contempt of court.

Accordingly, Jaques should be sanctioned. While order cannot be restored to the court's calendar through the payment of fines, compensation can be made to the victims of Jaques' prevarication. The fine is intended to be remedial in nature.

This Court orders Jaques to pay to the Clerk of Court the costs of compensating the twenty-two member venire panel at the usual rates of compensation of $30 per day plus 20½¢ per mile for transportation costs and $4 per day parking fees, a total of $920. The fine is to be paid within forty-five (45) days of the date of this Order.

In addition, Jaques is ordered to reimburse defendant Reiss Steamship Company for its counsel's hotel and attorney's fees for October 26, 1983. Mr. Dunn is directed to file an affidavit and accounting of his expenses for the evening of October 25 and attorney fees at his usual hourly rate for time expended on October 26, 1983.

IT IS SO ORDERED.

/s/ ANN ALDRICH
UNITED STATES DISTRICT JUDGE

Exhibit A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALI S. AHMED,
Plaintiff,

-vs- No. C 80 506

REISS STEAMSHIP COMPANY,
Defendant.

PLAINTIFF'S PRE-TRIAL BRIEF

TRIAL COUNSEL:

Leonard C. Jaques, THE JAQUES ADMIRALTY LAW FIRM, P.C., 1370 City National Bank Building, Detroit, Michigan 48226.

STATEMENT OF NATURE OF ACTION:

The subject cause is personal injury in nature and Plaintiff alleges it arises out of an incident of injury occurring while Plaintiff was employed by Defendant and assigned in the capacity of gateman to Defendant's vessel, "S.S. Richard Reiss" as owned, operated, maintained or otherwise controlled and navigated by Defendant herein. Further, Plaintiff contends that said injuries resulted from or were proximately caused by the negligence of Defendant and breach of warranty of the shipowner to provide a reasonably seaworthy vessel and a safe place in which to perform his labors, said acts and/or omissions resulting in a bifurcated cause of action under the Jones Act and the provisions of the General Admiralty and Maritime Law.

JURISDICTION:

This Court obtains jurisdiction over the persons and subject matter of the above entitled action by reason of the

EXHIBIT B

LUIS A. NINO, M.D., FAAFP, P.C.
27201 Ryan Road
Warren, Michigan 48092

TELEPHONE 575-9330

To Whom it May Concern:

This is to certify that I have been the attending physician of Mr. Leonard C. Jaques for several years. I have treated Mr. Jaques for Tinea Cruris, a chronic disease of the skin of the groin which causes exacerbations of severe Pruritus or itching off and on. It has been recommendation to Mr. Jaques that because of the nature, location and symptoms of this ailment he should avoid to be in public places and mainly court appearances all of which could jeopardize his professional appearance.

I was contacted by a pharmacist on October 24, 1983 from Baltimore, Maryland concerning medication for temporary relief and I did prescribe Mycostatin powder and Crisactin capsules to relieve the itching. On the following day as there was not much relief of the itching, I prescribed Benadryl and later received a call from him that he was drowsy and had to go to Court. My advice at that time to him was to refrain from his Court appearance and I promised to write this letter for him.

Sincerely,

Luis A. Nino, M.D.

LAN/red

Exhibit C

EXHIBIT C

DIST.	OFF.	DOCKET YR.	DOCKET NUMBER	FILING DATE MO.	DAY	YEAR	J	W/S	C	D	R 23	DEMAND $	OTHER	JUDGE/MAG NUMBER	JURY DEM.	YR.	DOCKET NUMBER
0647	01	80	0506	04	04	80	3	340				NEAREST $1,000 $1,200,000.00		4713	P	80	0506

PLAINTIFFS

AHMED, Ali S.

DEFENDANTS

REISS STEAMSHIP COMPANY

CAUSE

46 USCA §688, et seq (Jones Act); General Admiralty & Maritime Law

JURY

JUDGE ALDRICH

ATTORNEYS

BOB SWICKLE
GARY BAUM
Leonard C. Jaques
1370 City National Bank Bldg.
Detroit, Michigan 48226
#313/961-1080

ROBERT DUNN,
Mark L. Dailey
3266 Penobscot Bldg.
Detroit, Michigan 48226
#313/961-3234

1-10-83 Phone conf per Baum - 4 docs not in Tampa starting 1-17-83 - will be unavailable the 1st. Dept. in Yemen since Sept. 82, - re. next P.T. re 4-5-83 4:00, he will have pltf. here, he will send letter to Court & Dept, per Dailey's req.

3-1-83 Notice: P.T. re-set to 4-11-83 4:30

Action arose in Cuyahoga County (Category 8R)

CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID DATE	RECEIPT NUMBER	C.D. NUMBER	STATISTICAL CARDS CARD	DATE MAILED
	4-7-80	#14732		JS-8	4/30/80
				JS-9	

UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev. 1/78)

4-13-83 Stat'g Disp. T. 10-4-83 (5 days) 9:30 P.T. 10-3-83 4:00, Brief 9-26-83, Notice mailed

8-1-83 Notice: T. 10-24-83 9:00 P.T.

10-19-83 Phone conf per Jacus - move P.T. re

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALI S. AHMED
Plaintiff

vs

Civil Action
Number C80-506

REISS STEAMSHIP CO.
Defendant

ORDER

The court has filed its memorandum and order finding Attorney Leonard Jaques to be in contempt of court. Therefore, pursuant to Rule 58, Federal Rules of Civil Procedure,

IT IS ORDERED that Leonard Jaques is hereby fined the sum of $920.00, to be paid to the Clerk of Federal Court, Northern District of Ohio, Eastern Division, at Cleveland, Ohio, within 45 days from the date of this order.

IT IS FURTHER ORDERED that Leonard Jaques shall reimburse the defendant for its counsel's hotel and attorney's fees for October 26, 1983.

IT IS FURTHER ORDERED that Attorney Robert N. Dunn is hereby directed to file an affidavit and accounting of his expenses for the evening of October 25, 1983 and attorney fees at his usual hourly rate for time expended on October 26, 1983.

IT IS FURTHER ORDERED that the court's memorandum and order is hereby adopted as findings of fact and conclusions of law in accordance with Rule 52, Federal Rules of Civil Procedure.

ANN ALDRICH,
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALI S. AHMED
Plaintiff

Civil Action No. C80-506

vs.

ORDER

REISS STEAMSHIP COMPANY
Defendant

ALDRICH, J.

Pursuant to this Court's order of February 23, 1984, finding attorney Leonard Jaques in contempt of court and imposing sanctions including an award of expenses and attorneys fees to attorney Robert Dunn, Dunn has submitted an affidavit concerning his expenses for the evening of October 25, 1983 and his attorney's fees for October 26, 1983.

Dunn's affidavid, filed March 9, 1984, avers that he was the attorney of record for defendant Reiss Steamship Company in the instant case. His expenses for the evening of October 25, 1983 were:

$69.74	Hotel
15.12	Dinner
$84.87	Total

The attorney's fees billed to Dunn's client for his time on October 26, 1983 were $800.00, calculated at the rate of $100.00 per hour for eight hours.

Jaques has not objected to the affidavit.

Upon consideration, this Court finds Dunn's expenses and fees are reasonable. He is a partner in the firm of Foster, Meadows and Ballard, P.C. of Detroit, Michigan. Having observed Dunn's work in this case, this Court concludes that a billing rate of $100.00 per hour is amply justified. Since it

was necessary for Dunn to travel from out of state to appear for trial, his hotel and meal expenses for the evening of October 25, 1983 are awardable. Had Jaques timely advised this Court and Dunn that he would not be appearing for trial as scheduled, Dunn would not have incurred his additional expenses for the evening of October 25, 1983.

Accordingly, this Court approves Dunn's affidavit and orders Jaques to reimburse Dunn, pursuant to this Court's order of February 23, 1984, in the amount of $884.87.

IT IS SO ORDERED.

ANN ALRDRICH
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 84-3221

IN RE: LEONARD C. JAQUES,
Attorney-Appellant.

ALI S. AHMED,
Plaintiff,

v.

REISS STEAMSHIP COMPANY,
Defendant.

Before: MERRIT and WELLFORD, Circuit Judges; and HILLMAN, District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

It is further ordered that Appellant is assessed double costs.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk
/s/ John P. Hehman/LS
Clerk

Issued as Mandate: July 2, 1985

COSTS: None
Filing fee .....$
Printing .....$
Total .....$

A True Copy.
Attest:
/s/ Gary McCarthy
Deputy Clerk

No. 84-3221

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: LEONARD C. JAQUES,
Attorney-Appellant

ALI S. AHMED,
Plaintiff,

v.

REISS STEAMSHIP COMPANY,
Defendant

ORDER

BEFORE: MERRITT and WELLFORD, Circuit Judges and HILLMAN* United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John Hehman
John P. Hehman, *Clerk*

---

* Hon. Douglas W. Hillman sitting by designation from the Western District of Michigan

Transcript of Proceedings
October 26, 1983

(1)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

ALI S. AHMED,
Plaintiff,

vs.

REISS STEAMSHIP COMPANY,
Defendant.

Civil Action
No. C80-506

PROCEEDINGS HAD BEFORE THE HONORABLE ANN ALDRICH, JUDGE OF SAID COURT, ON WEDNESDAY, OCTOBER 26, 1983.

APPEARANCES:

On behalf of the Plaintiff:
Robert Swickle, Esq.
On behalf of the Defendant:
Foster, Meadows & Ballard, P.C.,
by Robert N. Dunn, Esq.

---

(2)

WEDNESDAY, OCTOBER 26, 1983, 3:00 P.M.

(The following proceedings were had in the Court's chambers.)

THE COURT: I wanted to indicate this is on the record and who is here, counsel for both sides, my clerk, Ms. Dutchess, and Deputy Clerk Bill Johnson.

I would like to ask first, Mr. Swickle, do you have any idea where Mr. Jacques is today?

MR. SWICKLE: No, I don't. To my knowledge, he is in Baltimore in this trial.

Transcript of Proceedings
October 26, 1983

THE COURT: Well, I am very disturbed at some of the things that have been happening, particularly with the communication which I had with Judge Howard, who is the presiding judge at the trial Mr. Jacques is supposedly at in Baltimore today.

What I want to put on this record is that this case was originally scheduled many months ago to begin jury trial on Monday, October 24th. On October 19th Mr. Jacques represented to my clerk (3) Mr. Johnson, that he was in trial in Baltimore and he requested the Court to move the trial over to Tuesday afternoon at 4:30, that is, Tuesday afternoon, the 25th, with the trial to commence on the morning of the 26th. Mr. Johnson so advised Mr. Daly of Mr. Dunn's office and Mr. Swickle's secretary.

On October 24th Mr. Johnson advised Judge Howard's secretary to advise Mr. Jacques that we expected him to be here on Wednesday, the 26th, for the trial, since the indication to us had been that the case in Baltimore would be given to the jury on Tuesday and that we expected that one of Mr. Jacques' partners could take the verdict and he would be available here by telephone if there were any questions coming from the jury. At that time we agreed that the pretrial would take place on Wednesday morning.

This office did not hear anything from Mr. Jacques until after 6:00 o'clock yesterday evening that would have indicated to us in any way that we would not be ready to go (4) forward with the pretrial with Mr. Swickle and with trial with Mr. Jacques on Wednesday. Consequently, it was too late after 6:00 o'clock last night for us to advise the panel of jurors that they need not report today.

We have been meeting in pretrial all morning. We have made some progress toward settling this case. At noontime Mr. Swickle indicated he would discuss the settlement offer with the client.

Mr. Swickle, correct me if I am wrong, but I believe you came back and suggested that if Mr. Jacques would talk to

the client, he felt he had a little leverage and it would facilitate some —

MR. SWICKLE: Basically, a face-to-face meeting, because Mr. Jacques was handling the case and I was pressed in for this, and I thought client relationships could be better maintained by Mr. Jacques and the client, which we discussed was possible, before I talked with the client at the lunch break.

THE COURT: All right Mr. (5) Baun, I think, who was with Mr. Jacques in Baltimore, talked to my clerk, Ms. Dutchess, yesterday evening and advised her that Mr. Jacques would have to be in Baltimore today because the Judge would be charging the jury and there might be more problems in connection with the jury charge.

During the lunch break Judge Howard, who is presiding at the trial in Baltimore, advised me that he had made special arrangements yesterday afternoon for Mr. Jacques to leave Baltimore shortly after 4:00 o'clock because Mr. Jacques had represented to Judge Howard that he had to be in Cleveland this morning, and Mr. Jacques has not in fact been at the trial in Baltimore during any part of today's proceedings.

It is 3:30 in the afternoon and Mr. Jacques himself has put in no appearance with this Court nor has he advised this Court as to any reason why he is not here.

I want to point out to you, Mr. Swickle, that this Court takes this matter very seriously. There is a question of 22 jurors who have been here at $30 a day. We are (6) wasting taxpayers' money, we are wasting the time of the jury, the time of this Court and I think Mr. Dunn's time and money.

I am making no judgments about what the facts as I understand them lead me to at this point. I am making no finding. I am suggesting that Mr. Jacques better have a very solid excuse as to why he is representing to two Federal Judges in two cities that he is with one or the other of them when, in fact, he is at neither place, and I do intend to

pursue this after we have concluded this case. I would appreciate it if you would advise your partner of that fact.

We have the additional matter that if I do not know before quarter to 5:00 this afternoon as to how to advise these 22 jurors as to where they are going to spend their day tomorrow, we are going to have some additional expense.

So the suggestion is that, unless you have reached any kind of agreement with the plaintiff in this case, that you had best try to find your partner and let this Court know what to do about the jury for tomorrow.

(7)

MR. SWICKLE: Okay.
THE COURT: All right?
MR. DUNN: Thank you. What would you like us to do?
THE COURT: Off the record.
(Discussion was had off the record.)

CERTIFICATE

I, JoAnne Pavolino, Official Court Reporter in and for the District Court of the United States for the Northern District of Ohio, Eastern Division, do hereby certify that the above and foregoing is a true and correct transcript of the proceedings herein.

/s/ JoAnne Pavolino
Official Court Reporter

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALI S. AHMED
Plaintiff

vs.

Civil Action No. C80-506

REISS STEAMSHIP COMPANY
Defendant

ORDER

Pursuant to 18 U.S.C. §401, this Court orders Leonard Jacques, Gary Baun and Robert Swickle to appear at a hearing on December 22, 1983, at 2:00 p.m., to show cause why sanctions should not be imposed and the responsible parties held in contempt of court for apparent misbehavior related to a failure to appear before this Court as scheduled on Wednesday, October 26, 1983.

Jacques, Baun and Swickle represented the plaintiff, Ali S. Ahmed, in a civil admiralty proceeding before this Court. Elaborate advance scheduling arrangements were made to insure Jacques and his client a firm trial date. On the designated day, this Court and twenty-two veniremen were ready and waiting to proceed. It appears that Jacques and/or his associates misrepresented Jacques' whereabouts, and delayed the Court and its trial calendar.

The responsible parties are ordered to appear for a hearing and be prepared to present any evidence on their behalf with respect to this apparent misrepresentation and delay.

IT IS SO ORDERED.

(s) ANN ALDRICH
UNITED STATES DISTRICT JUDGE

TRANSCRIPT OF PROCEEDINGS
DECEMBER 22, 1983

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALI S. AHMED
Plaintiff,

vs.

Civil Action
No. C80-506

REISS STEAMSHIP COMPANY,
Defendant.

- - - - -

PROCEEDINGS HAD BEFORE THE HONORABLE ANN ALDRICH, COMMENCING AT 2:35 P.M., THURSDAY, DECEMBER 22, 1983.

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APPEARANCES:

On Behalf of the Plaintiff:

Leonard Jacques, Esq.
Gary Baun, Esq.
Robert E. Swickle, Esq.
The Jaques Admiralty Law Firm
1370 City National Bank Building
Detroit, Michigan

- - - - -

(2)

THURSDAY, DECEMBER 22, 1983, 2:35 P.M.

THE COURT: This is a hearing to show cause why sanction should not be imposed on Mr. Jaques and/or his responsible associates held in contempt of Court for their failure to appear before this Court as scheduled on Wednesday, October 26, 1983.

This Court had guaranteed Mr. Jacques a firm trial date in the case of Ali S. Ahmed vs. Reiss Steamship Company for Monday, October 24, 1983.

The Wednesday before trial, Mr. Jaques' office called to say that a trial in which he was appearing in Baltimore would not be completed until Monday, October 24th. At his request, this Court continued the trial until Wednesday, October 26, 1983.

On Monday, my office spoke with Judge Howard's law clerk — Judge Howard is the presiding Judge at the case in Baltimore – and left word with Judge Howard and also with Mr. J. ues' office that we would expect Mr. Jaques for trial beginning on Wednesday at 9:30 a.m. It was suggested, I believe, to Judge Howard, as well as to Mr. Jaques' (3) associates, that one of the associates might remain in Baltimore to take the verdict there so that Mr. Jaques could be present in Cleveland that Wednesday. This office received no response to the query until Tuesday evening at 6:00 p.m. when Mr. Baun called to say that Mr. Jaques could not be in Cleveland for trial on Wednesday because his presence was necessary in Judge Howard's Courtroom on Wednesday morning.

Apparently, this Court's suggestion that Mr. Jaques' associate might stay for the jury instructions and Mr. Jaques might appear in Cleveland on Wednesday had been rejected.

However, since Mr. Baun did not so advise this Court until after six o'clock in the evening, it was too late for this Court to advise the jury clerk that 22 veniremen need not come in at public expense the following day.

At this Court's request, Mr. Baun arranged to send Mr. Swickle on Mr. Jaques' behalf with Ali Ahmed in Cleveland to meet with the Court and defense counsel for a (4) pretrial conference and settlement negotiations. Mr. Baun explicitly represented Mr. Swickle would have full authority to settle the case.

Stalemate settlement discussions stalemated on Wednesday afternoon when Mr. Swickle advised the Court that no progress could be made until Mr. Ahmed could speak to Mr. Jaques. It became clear that despite Mr. Baun's representation that Mr. Swickle had authority to settle, he really had no such power to allow the case to settle unless or until Mr. Ahmed spoke to Mr. Jaques.

Hoping to resolve this stalemate, the Court called Judge Howard in Baltimore in an effort to reach Mr. Jaques and learned that he was not appearing before Judge Howard. Judge Howard said that he had excused Mr. Jaques at four o'clock in the afternoon the previous evening so that Mr. Jaques could be in this Court on Wednesday morning.

Mr. Jaques' associates were present while Judge Howard delivered the jury instructions on Wednesday morning, but Mr. Jaques did not make an appearance in Baltimore. (5) Judge Howard believed that Mr. Jaques was in Cleveland and this Court believed that Mr. Jaques was in Baltimore. Apparently, he was at neither place.

It is of considerable concern to this Court that we have apparently a representation having been made with respect to whereabouts of counsel to one Federal Judge in one situation and to another Federal Judge in another and it is, if the facts are as they appear to this Court and to Judge Howard, this is not acceptable behavior on the part of counsel who appear in Federal District Court. That is the most serious of the problems that this Court has.

The other problem is, of course, the fact that no one was advised early enough in the day to have avoided the expense

of all the veniremen at a point in time when it was obvious to counsel at least that they need not have been here.

I have set this matter for hearing and would be pleased to hear whatever facts there are or justifications there may be for what appears to be a rather serious situation.

(6)

I don't know, Mr. Jaques, how you plan to detail this —

MR. JAQUES: To please the Court, I am going to make some few preliminary remarks.

I am here representing Mr. Baun and Mr. Swickle as their counsel, and my law firm.

I want to say this from the onset, your Honor, that I agree, this is a serious situation, but for reasons differing from your contentions.

Now, first of all, let me say this. I want the record to show that I believe this is concocted by the Court and this law clerk and there is no predicate for any action under 18 U.S. Code Section 401.

Now, I have been a member of this Court for many years, long before you, your Honor, came on this bench. And this is the first time in my lifetime I had to be subjected or my firm to any such type of conduct three days before Christmas during this busy season.

I have a law firm, we have a law firm. There is a firm called "Jaques Admiralty Law Firm." I am a member of that firm.

(7)

When I became a member of this Bar or any firm, I did not sign up for a duration. I am not in the military nor under any Court's direct orders to do anything, but my firm is. Whenever my firm represents anyone, we are their counsel and we respond.

Now, this Court indicates in its order to appear that the proceedings are pursuant to United States Code, Title 18, Section 401. I read that with great interest. It states specifically that "A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as" follows in three categories.

Now, those categories must be read in reference to this order to appear to show cause.

First, "Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice."

Here in the order it is one of these "and/or" type of orders which is not particular in any way. It indicates that they're to show cause as to why contempt of Court or (8) why there was misbehavior related to failure to appear before this Court as scheduled on Wednesday, October 26, 1983, show cause, if any reason there may be.

Now, that's not misbehavior in category number one.

Number two, "Misbehavior of any of its officers in their official transactions." That, of course, does not pertain to these proceedings.

The third one is "Disobedience or resistance to its lawful writ, process, order, rule, decree, or command." At no time did this Court ever indicate anyone was to be here particularly.

Now, I will go back to these proceedings. Gary Baun has been present at all these proceedings, and this Court addressed all correspondence to Gary Baun from the time the complaint was filed forward. Gary Baun attended all pretrials. Gary Baun of the Jaques Admiralty Law Firm was here and there was never a time when Court convened that there was not someone from Jaques Admiralty Law Firm here.

(9)

Now, there was here an indication that this Court went through elaborate advance scheduling arrangements to make sure that the client would have a fair trial. The elaborate, the agee title meaning is beyond me. All the Court did was set October 4, 1983 and then the Court changed that on its own motion. We had brought the client back from a foreign country and he says, "Why am I here?"

By the way, I would like the record to show we were here at two o'clock and the proceedings commenced at 2:35.

Now —

THE COURT: Mr. Jaques, with respect to your client's whereabouts, isn't it true that you represented to this Court that your client had to be brought in from a foreign country in order to go forward with this trial when it was originally scheduled?

MR. JAQUES: Judge, let me get something straight. There isn't going to be any testimony here unless we get something straight first.

You are indicating that you are (10) proceeding under a contempt. Are you proceeding under a criminal contempt? You have not enunciated what is required to be set forth in accordance with Rule 42 of the Federal Rules of Criminal Procedure.

Now, with regard to any other contempt, there is no particularity here to bring it inside the purview of 401.

THE COURT: It seems to me that if you have represented to this Court you are in Baltimore before a Federal Judge and you represent to the Judge in Baltimore that you are before this Court, then you do indeed come within Section 401 of Title 18.

MR. JAQUES: Whereabouts? It says "and none other," no other contempt authority except what is specified here in one, two, and three.

THE COURT: I think misrepresentation to either myself or Judge Howard as to your whereabouts, telling us that you are in the other's Court to both Judges is "misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice."

(11)

MR. JAQUES: I am not answering. I am not saying anything was represented to Judge Howard. You are not cognizant and that is not before this particular body here. I make no representation. I don't believe you will ever see Leonard Jaques make any representation to this Court at all.

THE COURT: Well, I would like to know.

MR. JAQUES: You would like to know? I would like to know a lot of things about this.

THE COURT: Mr. Jaques, I simply would like to know why the representation was made to this Court that you could not be here as scheduled because you were appearing in Baltimore when I was then advised by Judge Howard that you were not in fact in Baltimore. He indicated to me that you had represented to him in Baltimore that you were in Cleveland.

MR. JAQUES: It is all very clear that I am not going to make it clear unless I get some understanding with regard to what authority —

(12)

THE COURT: You have this opportunity, Mr. Jaques, to make that clear to this Court.

MR. JAQUES: Judge, you are going to operate within the law —

THE COURT: Absolutely.

MR. JAQUES: — and I am going to tell you right now you will, and I will insist upon that.

THE COURT: I will insist upon that.

MR. JAQUES: And there is just no predicate for this Court at this time, and I am moving to dismiss these charges, and I am building this up to —

THE COURT: Is that all, you are moving to dismiss these charges now?

MR. JAQUES: That is what I am doing.

THE COURT: All right. Have you presented to me everything you want to present in response to my question?

MR. JAQUES: To your questions?

THE COURT: Right, my question as to —

(13)

MR. JAQUES: You are not asking me questions.

THE COURT: — there is some misunderstanding with respect to your representation.

MR. JAQUES: I made no misrepresentation and I am moving as counsel for these two gentlemen to dismiss these charges because they are not properly founded and I am giving reasons why for this record.

This Court has not set forth under 401 specifics with respect to any contempt proceedings at all.

This Court has not specified and it is stated explicitly that it must be specified.

This Court has indicated that this hearing is called pursuant to 18 U.S. Code, Section 401; but the particulars of 401 are three and there is no designation as to where the proceedings fall within one, two, or three.

By the language itself, there is no indication that there is a predicate for any such contempt proceedings whatsoever.

THE COURT: Well, I think I laid them out when I started this proceeding, (14) but if I didn't, I would be more

than happy to put them in writing and adjourn this proceeding until January 5th and we can continue it after you had a chance to see what I am driving at.

MR. JAQUES: No, this is it. You have already called this proceeding and we are here and we will live and die with this particular proceeding.

THE COURT: Okay.

MR. JAQUES: Now, either you are going to dismiss it or you are going to have to live with us as far as we are concerned, because you called two, three busy lawyers down here for, we believe, a spurious reason. There is no predicate for it.

Now, you listened to some law clerk: you didn't talk to a Federal Judge. By your own admission, you did not talk to a Federal Judge —

THE COURT: That is not right. I spoke to Judge Howard.

MR. JAQUES: All right, so you did. But what is the basis of it? I am not duty-bound unless — in order for one to fail (15) legally to appear, he must have a pre-existing duty to appear. At no time did I ever have a pre-existing duty to appear, nor did Mr. Baun, nor did Mr. Swickle.

But we had representation. We had representatives here always when this Court convened.

Now, if this Court failed to go forward with a trial when Mr. Swickle was here, that was the Court's election. He is a licensed lawyer and he could have proceeded with trial and picked the jury. He could have done anything. But this Court elected not to have a trial, but simply to sit down and talk settlement.

Now, what you indicated about Mr. Swickle, for example, in your opening remarks, that Mr. Baun represented to somebody that he, Mr. Swickle, would have authority. Well, Mr. Swickle had as much authority as anybody could have with regard to settling.

THE COURT: I understand you had a difficult client in this case.

MR. JAQUES: Well, that wasn't our major problem.

(16)

But there was never any representation made to this Court whatsoever. There was no pre-existing duty for Leonard Jaques to ever be here at all.

I had two other lawyers with me trying the case in Baltimore. I had no duty to be there either. I could be excused for whatever reason I wanted to be excused irrespective.

I had no duty to be in this Court. The senior member of a law firm need not be in all proceedings certainly. It is ludicrous to even suspect that any credence could be lent to such proposition.

In order to be charged with failure to appear, there must have been a pre-existing duty. You don't have any order indicating that there is a pre-existing duty at all.

There was always somebody here. You would have a basis for something if no one showed up. But what I am setting forth for all particulars, there just was no misconduct, misbehavior of any kind.

You indicated apparent misbehavior that you set forth. There is no misbehavior of any kind.

(17)

Now, I practice in a lot of Courts, but I am not duty-bound. I am not some type of a buck private in the Army —

THE COURT: You do not believe that if you have indicated that you are going to be the trial counsel and the trial date is set, that you have any obligation to appear?

MR. JAQUES: Judge, I was not the trial counsel here.

THE COURT: Oh, Mr. Baun was the trial counsel?

MR. JAQUES: Mr. Baun was always on the proceedings. I was never on any proceeding. You never addressed myself, you never addressed one time to Leonard Jaques at all.

All I have got to say is that the law firm has a duty to be sure to appear at designated times, but there is no Court rule and no rule by this Court or no order of this Court that any specific persons of the law firm must appear.

You know, we do not treat this very lightly, people accusing us of contempt.

THE COURT: I am searching my (18) mind as to whether there was anyone from your law firm that was ready to go forward with the trial on October 26th.

MR. JAQUES: Put it this way. All of us are members of this Court and the Bar and we are ready to go forward.

THE COURT: Were these people who were here on Wednesday, October 26th ready to go forward?

MR. JAQUES: They were ready to go forward and it was this Court's election not to have the jury selection go forward, but simply to try to settle the case.

THE COURT: That was on Tuesday afternoon; Wednesday morning is when you were not here.

MR. JAQUES: No. The jury was here Wednesday morning. There was only one appearance.

THE COURT: The veniremen we had Wednesday morning, but my recollection is we were not impanelling —

MR. JAQUES: Judge —

THE COURT: If he interrupts me, write down what the Judge says.

(19)

My recollection is that there was no one here on Wednesday morning from your firm prepared to go forward and that was the day on which we were supposed to go forward. The jury was here. We did not impanel a jury until the following day when you arrived.

Now, if I am wrong about that —

MR. JAQUES: That fact may be true.

THE COURT: — if I am wrong about that and someone from your office was here and ready to go forward on Wednesday morning, October 26th, then I think you have fulfilled your obligation to have someone here.

MR. JAQUES: Bob Swickle was here. He had the videotapes with him, medical videotapes. He had the Plaintiff with him. He had the depositions with him to read to the jury. He had no restraints.

We had been told by the clerk of Judge Howard's Court that this case was going to go on Wednesday and we were told that, I believe, on Tuesday. So with that we made sure that Bob Swickle was here when the Court was not (20) going to render any accommodation to us and he was here ready to go.

Your Honor, there could be no dispute about that. It was this Court's election not to call a jury; it was not the Plaintiff's insistence. We were ready. He was down here, because he figured, okay, fine, I'm a gun, I'm a lawyer, I could go forward.

Now, that's exactly what you had, and you had never, at any time, a failure to appear at this Court.

Now, I am saying that these pleadings are defective. There is no predicate upon which such proceedings can ensue based upon 401.

They cannot ensue based upon Rule 42, because they don't set forth criminality with regard to the contempt. There is no contempt in the presence of this Court and there is no unlawful failure to appear because there was no order by this Court or any general Courtroom, local Courtroom rule for anyone else to appear, anyone specifically other than the firm which was representing the Plaintiff.

I am going to say that on behalf of (21) those two gentlemen I just indicated I am representing, I think you ought to dismiss these charges.

(Discussion had off the record.)

THE COURT: Mr. Jaques, we have a different recollection as to the pretrial sessions that took place during those two days than you have represented and the best way to resolve that is for the Court to get the court reporter that was involved and find out exactly what happened at those two pretrials.

If I am mistaken, then I owe you an apology; if you are mistaken, then so be it. But I am not going to rule on this until I can check that record.

Is there anything else you want to represent?

MR. JAQUES: Wait a minute. I want to know what's going on. What record are you talking about?

THE COURT: I am talking about the record of the court reporter that was in chambers during the sessions.

MR. JAQUES: You have a (22) transcript of that.

THE COURT: What?

MR. JAQUES: You have a transcript of it.

THE COURT: Yes, I do, but I don't have it here.

MR. JAQUES: Well, we have it.

THE COURT: Well, I don't have it.

Was it filed?

MR. JAQUES: Well, I don't know. It came from your court reporter. We have the transcript. We have a transcript, let me say that.

THE COURT: I do not think this Court has a transcript of the sessions in chambers during that Tuesday or Wednesday.

MR. JAQUES: I want to understand that. The session in chambers was a unilateral session by the Court. There was no testimony taken. I want to know —

THE COURT: Of course there was no testimony taken, but there was a discussion and representations made by counsel at that point in time.

(23)

MR. JAQUES: Well, here we are. Representations made by counsel as to what? Here, take a look at it.

THE COURT: As to whether he was ready to go forward with that trial.

MR. JAQUES: As to whether he was?

THE COURT: Yes.

MR. JAQUES: It was very short. Why don't you take a look at it.

I will put it this way. Whether he was ready or not would be a far stretch — he was here. I don't know, but I can't understand any reason why he could not go forward and I do not see anything in this transcript that says he couldn't. Let me scan it. I don't see a thing.

(Pause.)

MR. JAQUES: Is there anything there?

MR. SWICKLE: No.

MR. JAQUES: He says — Bob Swickle, he was the one that was here — he says there is no assertion that he wasn't ready to go forward.

(24)

(Pause.)

THE COURT: We do have an indication on page 4 from Mr. Swickle that it was basically, it is you, Mr. Jaques, that was handling the case, that he was pressed in for this.

MR. JAQUES: Where are you reading, Judge?

THE COURT: Bottom of page 4.

It also seems to me that had Mr. Swickle been ready, able to go forward with this case, that we could have gone forward with it on that Monday. We were putting off the case for two days so that you, yourself, would be available to try it.

MR. JAQUES: Well, you weren't putting it off necessarily for me, you weren't putting it off for Mr. Baun or anyone else.

I mean there is nothing wrong with adjournment. There is nothing wrong with adjournment. I mean you get adjournments.

THE COURT: I didn't suggest there was anything wrong with an adjournment, Mr. Jaques. I am suggesting there is something very wrong with your firm where you are (25) representing to one Judge that you are with the other one and, with the other Judge, you are representing that you are with the first one.

MR. JAQUES: Judge, that is not a legal basis for any contempt proceedings. I don't misrepresent to anybody and, if it becomes necessary, I will set forth the reasons, but I am not in a position now to set them forth because this is an illegal proceeding. You have not yet, Judge, indicated under what authority you are proceeding other than the catch-all 401 one, two, or three.

I am looking at your law clerk, who put this together. She doesn't indicate what it is.

THE COURT: Well, I would like to suggest the second under 18 U.S. Code 401(3) because I think that your behavior in terms of telling me and Judge Howard where you were not is misbehavior —

MR. JAQUES: I haven't told you anything.

THE COURT: — or an officer (26) of the Court in their official transactions.

MR. JAQUES: I didn't tell you anything.

THE COURT: You wanted a specific section and I have given it to you.

MR. JAQUES: If you want to hang this, Judge, you just go right ahead and we will let the Sixth Circuit take care of it.

THE COURT: Right.

MR. JAQUES: But you ought to have a basis for it.

THE COURT: Is there anything else you want to present?

MR. JAQUES: I want to know what you are doing? Are you holding a hearing?

THE COURT: I just had a hearing permitting you to show cause as to why I should not impose sanctions. Have you now shown me whatever cause it is you want to show me?

MR. JAQUES: That isn't true. You just failed to perceive what's gone on.

THE COURT: I understand (27) precisely what's gone on.

MR. JAQUES: I don't think you have. I have a motion before you to dismiss these charges.

THE COURT: I am taking it under advisement.

MR. JAQUES: If you are taking that under advisement, then we need to know what you want to do with regard to the hearing?

THE COURT: Well, all right. If it makes it simple for you, I will deny the motion. Now is there anything else you want to present?

MR. JAQUES: Yes, while we are down here, sure. We will put up here.

I would like to ask, I would like to know is there any more specifics that you are charging us with?

(Discussion had off the record.)

THE COURT: I'm sorry. Go ahead.

MR. JAQUES: I want to know the basis of the charge, under what guise of authority was Leonard Jaques required to be (28) in this Court?

THE COURT: Leonard Jaques was supposed to be here, he or his law firm was supposed to be here to try a case that had been, I think, properly continued in the first instance at your request, personally, not at one of your associates' requests.

I think that under 18 U.S.C. 401(3), Sub-2, it is misbehavior on your part to advise me that you are in Baltimore and advise Judge Howard that you are in Cleveland.

MR. JAQUES: Judge, I am going to tell you right now what it is. I am going to tell you why I wasn't there. I don't like the indignity that you have put me through and I think it is most inappropriate for a Court to do this. But I am going to tell you why.

I was in Baltimore trying a lawsuit and on Tuesday, before we were to be here, closing arguments finished up. I had nothing else and I had every intention to come here. But I had a problem.

I did not misrepresent to anybody. I am only giving this to protect the record. I (29) don't expect you to place any credence on anything, but here is this.

Mark this as an exhibit.

- - - - -

(Court Exhibit No. 1 was marked for the purposes of identification.)

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MR. JAQUES: I wasn't here because I couldn't be here. I was not here, Judge, because I had the screaming itches in the crotch. I was so badly in need of medical care that I had been in communication with my physician a lot. Judge, I wasn't here because I would have been scratching my testicles constantly if I had been here.

Judge —

THE COURT: Mr. Jaques —

MR. JAQUES: Judge, do you understand that?

THE COURT: You don't have to be so graphic. You could have simply let the Court know that for medical reasons you were not going to be here and you could have —

MR. JAQUES: Judge, it was not a medical reason that I would have been able (30) to frame earlier. That's one thing.

THE COURT: It doesn't seem awfully difficult to me.

Is there anything else?

MR. JAQUES: Well, I think you better line up your pigeons, because if you want to knock these three lawyers over on your contempt, you better have some kind of testimony from them.

I want to say this, that on behalf of Mr. Swickle and Mr. Baun, there is not notice of any specific charges here at all in this order to show cause.

(Discussion had off the record.)

THE COURT: Mr. Jaques, this was an opportunity the Court was offering you to put on evidence as to why sanctions should not be issued. It's not the Court's burden to put on the evidence. Do you want to have anything from Mr. Baun or Mr. Swickle?

MR. JAQUES: Well, let me say this. You put us at a very serious disadvantage because you don't set forth the specifics as to Mr. Baun, Mr. Swickle, and Mr. Jaques. I mean it is a kangaroo-type of situation (31) that we do not know what your allegation is. You are asking us to put on testimony to refute what?

You don't show where we had a pre-existing duty to be here, but we were there, the law firm was here.

THE COURT: Well, I think, as a factual matter, we have two problems, one of which is whether Mr. Swickle was in fact ready to go forward with this case, which we have some dispute about as a factual matter, or whether it was being represented to this Court that, indeed, no one from your law firm wanted to go forward until you would be here personally.

The second thing is the representation that was made by Mr. Baun on the telephone on Tuesday evening that you would in fact be in Baltimore on Wednesday. I do not know what Mr. Baun thought, where he thought you were.

MR. JAQUES: Okay. All right. Let's go forward.

THE COURT: Is there anything you want to say about that?

I guess you told us your problem, so we (32) know why you weren't here.

MR. JAQUES: Just a moment.

THE COURT: Why you were not here and you were also not in Baltimore. We will accept the exhibit.

MR. JAQUES: I think what you need to do is to understand it in time frame, too. Do you understand that? I mean in time frame.

At the time on Tuesday — at least the record is getting this, maybe no one is interested in it, but the record is taking it — on Tuesday, leaving the Courtroom in the afternoon, oh, it was somewhere around, I don't know, 2:30, three o'clock, is one thing, and then being in this Court is something else.

Now, what I am saying is if you read the exhibit, you will see the problem arising. But it makes no difference, because Mr. Swickle was here, the firm was represented.

Let me put Mr. Swickle on here.

Why don't you just tell them. Go ahead.

MR. SWICKLE: I don't know if you have the entire file there, but the file (33) will reflect —

THE CLERK: Do you want to swear him in?

MR. JAQUES: I think a lawyer is always under oath.

THE COURT: I am under that impression.

MR. SWICKLE: As far as the trial, the deposition of the witness on the boat, I took that deposition. The Court file will represent that.

The medical depositions on the case, Dr. Newman's and — there is another doctor, but I can't think of his name — I took on the file. I don't believe I took the Plaintiff's deposition, but I was involved in the very recent matters relative to the trial.

What had transpired, is the Tuesday before I received a call from your clerk — I don't know their name. It was a woman. I don't remember her name — advising me we will have a settlement conference on Wednesday. Come down at 4:30. I said fine.

Within five minutes, I got a call back (34) from the same woman indicating she could not reach Mr. Dunn, therefore, come down and we would have a settlement conference in the morning.

I was here at 8:30 with the client with the entire file. There were settlement discussions, I think meaningful, that we had.

The client did not want the money, and ultimately more money was offered, so I can't fault him.

Had the communications been from your Court the day before to try the case, I think I would have tried the case.

I think to settle the case, to have meaningful discussions, I would have to know the file and I knew the file.

In talking to your Honor, we were talking about the file in depth, the liability and medical. We had a vibrator, we had it and explained it.

I think the Court can recall I was well aware of the particular facts of the case and had the word been to try the case, we would have tried it. I would have tried the case, no problem.

(35)

The Court in lieu wanted to talk settlement. Ultimately the settlement talks succeeded, which I think shows that settlement was on everybody's mind.

The court will recall there was a problem in the whole settlement talks because the authority on the Defendant's part came from London. With the time difference, he couldn't get ahold of London. Instead of coming back the next day, we agreed, so Mr. Dunn would have a chance to talk with his client, his person, whoever it was in London, we agreed to come back Friday in lieu of the next day.

So what it was, it was a case where there was some very serious settlement negotiations which succeeded and that's the only reason that case wasn't started for trial.

It is complicated when you have Lloyd's of London with the time lag in it and no one wanted to pick a jury, to start the case and try it when a settlement was possible and ultimately everybody's optimism on the settlement proved right.

THE COURT: Your representation (36) is that, however, you were authorized to go forward with this trial on Wednesday?

MR. SWICKLE: Certainly, but I understood the Court wanted to talk settlement. That happens on every case you try. There are settlement talks before the trial. Fine, we did that, I did that.

If the Court wanted to try the case, fine with me.

THE COURT: You have no recollection of there being some discussion about not being able to go forward with settlement or with any meaningful discussions because Mr. Jaques had a close relationship with this particular Plaintiff than anyone and, in fact, I think counsel for both sides had agreed to what they thought was a reasonable settlement figure and the individual Plaintiff was very difficult to convince; you don't recall that? You do not recall there being a day there when Mr. Jaques discussed a settlement with the client in Detroit.

MR. SWICKLE: That was on the next Tuesday which nothing happened there either because he was in the same — the only (37) thing that changed the case, settlement-wise, between Wednesday and later was $25,000 more in the offer. So it really made — it is not the case where the client agreed to the same money later on. The Defendant increased the offer by 25 per cent. That's what settled the case.

THE COURT: Didn't we put a jury in on that case eventually?

MR. SWICKLE: I wasn't here on Friday. I understand that one was picked, but it happens.

MR. JAQUES: That's all —

MR. SWICKLE: What happened, we picked the jury and had two days of proofs and had the case settled. When you have the cases with London and communication problems, oftentimes it is a wise decision by the Court to have a settlement discussion like this and the case will ultimately settle as happened here.

MR. JAQUES: Let me say this, your Honor. That jury was picked because the Court indicated, well, let's pick a jury, because Mr. Dunn had not gotten back to his (38) people with regard to the amount that the client indicated in writing. If you recall, I sent back there to you the amount that the Plaintiff said he would take and he signed it. Now, that was the reason why we went ahead and picked the jury, because he didn't have a chance to communicate the demand to the client.

THE COURT: Right.

Let me ask, Mr. Baun, when you called this office that Tuesday morning, sir, from Baltimore to tell us that Mr. Jaques would not be available here the following day, was that because of his illness or was there anything going on in Baltimore? What's your situation?

MR. BAUN: Well, your Honor, I think the Court will recognize, ultimately, one can only speak on behalf of one's self. And from my standpoint, I think the record will reflect that I was the main name on all the pleadings. If you recall, I did appear before you personally for the pretrial conference.

THE COURT: Yes.

(39)

MR. BAUN: I had appeared for every conference prior to that.

When I spoke with your clerk, and I believe it was Ms. Dutchess, that is what I had in the back of my mind. I mean I was intimate, I was perhaps, in fact, the most intimately knowledgeable lawyer with this case.

I was involved in the trial in Baltimore and, in fact, that's where I was the next day. It was my representation that I could not be here.

In fact, I was in Baltimore and I think the Court will also recognize that ultimately I did appear here before the Court when the matter did proceed to trial. In other words, what I am saying is that this is the frame from which I was speaking to your clerk.

THE COURT: You mean you were simply telling the clerk you would not be here on Wednesday, the 26th? You were not making any representations as to where Mr. Jaques would be?

MR. BAUN: Well, I don't recall, you know, the exact conversation that (40) took place. But that was what was on my mind. I was in Baltimore with Mr. Jaques trying that case. I knew that I would ultimately be here. I would have to be here, because of my intimate knowledge of the case.

THE COURT: But that case did in fact go to the jury on the 25th; right?

MR. BAUN: It did not go to the jury on the day — in fact, that was one of the topics of discussion between your clerk and I, is that she said that it was her belief that the case did go to the jury that day when in fact it had not and it was not to have gone to the jury until the next day, which it did.

THE COURT: Closing arguments were completed on the 25th.

MR. BAUN: That is correct.

THE COURT: And the instructions were given the next day.

MR. BAUN: That is correct.

However, the instructions were not even completely settled until the next day.

THE COURT: But you were the only one representing your firm on that case (41) that last day?

MR. BAUN: Mr. Donald McLennan and myself, there were three of us present at the trial.

THE COURT: When did Mr. Jaques leave?

MR. BAUN: The exact hour or time, I don't recall.

THE COURT: Well, the day.

MR. BAUN: I believe it was that day.

THE COURT: The 25th?

MR. BAUN: No, not the day I spoke with your clerk, the next day.

THE COURT: So if Judge Howard told me that Mr. Jaques had been excused the day before, that is, the day that the closing argument was completed, but before the case went to the jury, right, if he told me that Mr. Jaques had been excused at four o'clock that afternoon of the 25th and had, in fact, not been in his Courtroom any time on the 26th, that would be consistent with your recollection?

MR. BAUN: I don't understand (42) what the Court's saying. He was there at the Court on the 25th. Mr. McLennan, Mr. Jaques and myself were there on the 25th the full day.

THE COURT: Right. I am talking about the 26th, the day the case went to the jury, the day the instructions were read to the jury.

MR. BAUN: No, he was not there on the 26th that I recall. No, just Mr. McLennan and myself.

THE COURT: Then your recollection is that on the 25th you represented to Mrs. Dutchess that you would be detained in Baltimore on the 26th, but not that Mr. Jaques would be detained?

MR. BAUN: That is what I recall. I recall the particular focus of the discussion was the fact of the trial schedule, itself. She had been under the belief that the trial had been concluded and we were merely waiting for the jury verdict to be returned. I had informed her that the jury had not even been charged, the charge had not yet been completely settled, and the (43) jury had not gone in on deliberation. I think the record will reflect that was the case.

THE COURT: Okay. Thank you.

Do you have anything else, Mr. Jaques?

(Discussion had off the record.)

MR. JAQUES: Well, I think the exhibit indicates the situation as occurring that I was not, no matter what my intentions may have been, I certainly was not able to be in Court or any Court on the 26th.

But based on the testimony here, which is rather clear, I think indicative that there was no representation by Leonard Jaques to this Court that Leonard Jaques would be here on the 26th and, in context, there was no representation at all by anybody to that effect, only that Mr. Baun would not be here.

I do not think that this is a justiciable matter.

I think it is an indignity to counsel. I think we pay a price by being here at this time. I think the Court is mistaken and ill-informed.

I don't know if you want to go any (44) further. It has to be a personal vendetta and I think you better dismiss this, Judge.

THE COURT: Well, Mr. Jaques, I assure you it is not a personal vendetta and I thank you for appearing here, so we can get some information straight and we will adjourn.

- - - - -

(Court adjourned.)

- - - - -

(45)

CERTIFICATE

I, Francine C. Pallo-Salopek, Court Reporter for the United States District Court for the Northern District of Ohio, Eastern Division, do hereby certify that the foregoing is a true and accurate transcript of the proceedings had herein.

(s) Francine C. Pallo-Salopek
Court Reporter

Supreme Court, U.S.
FILED
JAN 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-489

IN THE

Supreme Court of the United States

October Term, 1985

LEONARD C. JAQUES

v.

THE HONORABLE ANN ALDRICH, United States District Judge for the Northern District of Ohio, and REISS STEAMSHIP COMPANY

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR THE HONORABLE ANN ALDRICH, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF OHIO

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QUESTIONS PRESENTED

I.

A. Is a civil contempt proceeding required to have all the due process controls of a full criminal prosecution?

B. In any event, was the Petitioner in this case accorded all the requisite due process safeguards?

II.

A. Is a Trial Counsel's failure to appear for trial in accordance with a Trial Order a violation of 18 U.S.C. § 401(3)?

B. Does the appearance of substitute counsel who is unprepared and does not have full authority to try or settle the case relieve Trial Counsel of his responsibility to appear?

III.

A. Is Trial Counsel's failure to appear for trial on a date which he requested "misbehavior" in the "presence" of the Court or "so near thereto" as to obstruct the administration of justice under 18 U.S.C. § 401(1)?

B. Alternatively, can Trial Counsel be held in violation of 18 U.S.C. § 401(1) as a result of a misrepresentations made directly to the Court by and through associate counsel regarding Trial Counsel's reasons for failing to appear for a scheduled trial?

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STATEMENT OF THE CASE

This brief is filed on behalf of The United States District Court for the Northern District of Ohio, The Honorable Ann Aldrich, District Judge. It is filed in opposition to the petition filed by Leonard C. Jaques, Esq. requesting this Court to grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit affirming the decision of the District Court, which held Petitioner in contempt of court.

FACTS

Petitioner represented a plaintiff in the underlying case before the District Court, *Ahmed v. Reiss Steamship Co. (Civil Action No. C 80-506)*. Petitioner was listed on the Court's docket sheets as attorney for the plaintiff. (Exhibit C, Memorandum and Order, Pet.App. 37a; clearer, complete copy, Respondent's App. A-1). He filed the Complaint in the case and he was listed as the "Trial Counsel" on the Plaintiff's "Trial Brief." (Exhibit A, Memorandum and Order, Pet.App. 35a). Petitioner was handling the case for the plaintiff. (Tr. 10/26/83 P.T. 4, Pet.App. 45a).

The Court set a firm trial date as a courtesy to Petitioner and his client since his client was represented to be in Yemen and had to travel to Ohio for the trial.[1] It was not the regular practice of the Court to grant firm trial dates. The Court, however, "was pursuaded that Jaques' case presented unusual circumstances which warranted exceptional scheduling arrangements and the October 24, 1983 trial date was guaranteed." (Memorandum and Order, Pet.App. 19a). October 24, 1983 was the date ultimately set for the pre-trial and October 25, 1983 for the trial. On August 1, 1983, the Court sent a notice/order captioned a "Trial Order" to counsel, which set the pre-trial and trial dates, required counsel to file pre-trial briefs and attend to other matters.

[1] This representation now appears to be inaccurate. *See* Memorandum and Order, Pet.App. 19a, n.1.

Petitioner called the Court on Wednesday, October 19, 1983, spoke to Judge Aldrich's deputy clerk, William Johnson, and requested that the pre-trial and trial dates be postponed one day because he was on trial in Baltimore. The deputy clerk rescheduled the pre-trial to October 25 and the trial to October 26. The docket sheet indicated the conversation that the clerk had with Petitioner. It states: "10-19-83 phone con with Jaques — move P.T. to 10-25-83 4:30 & T. to 10-26-83 9:30, per Dailey's secy per Swickle's secy." (Docket Sheet, Exhibit C to the Memorandum and Order, Pet.App. 37a; clearer, complete copy, Respondent's App. A-1). The pre-trial was later moved to the same day as the trial (October 26, 1983). Petitioner had direct knowledge of the trial date since it was set in the October 19 conversation between Petitioner and deputy clerk Johnson.

On Monday, October 24, 1983, the deputy clerk called Judge Howard's chambers at the District Court in Baltimore. He left word reminding Petitioner that he was to appear before Judge Aldrich in Cleveland on October 26, 1983 for the pre-trial and the trial. (Docket Sheet, Exhibit C to the Memorandum and Order, Pet.App. 37a; clearer, complete copy, Respondent's App. A-2). Petitioner admitted having received the message from Judge Howard's secretary. (Tr. 12/22/83 Hearing 19, Pet.App. 59a).

In his brief, Petitioner argues that the deputy clerk's phone call to Judge Howard's chambers was the only communication from the Ohio Court regarding the October 26 trial date and that there is no indication that he actually received the message. (Pet. 4). The record indicates otherwise. First, the docket sheet reflects a conversation on October 19, 1983 between the deputy clerk and Petitioner himself at which time October 26 was set as the trial date. (Docket Sheet, Exhibit C to the Memorandum and Order, pet.App. 37a; clearer, complete copy, Respondent's App. A-1). Second, Petitioner admitted at the December 22 hearing that he in fact received the message from Judge Howard's secretary. (Tr. 12/22/83 Hearing 19, Pet.App. 59a).

At 6:00 p.m. on October 25, 1983, the evening before the pre-trial and trial, petitioner's associate, Gary Baun, called the Court and said that Petitioner could not be in Cleveland the following day because he had to remain before Judge Howard while the jury instructions were given.[2] By the time of Baun's call, it was too late to recall the venire panel notified to appear the next day. (Memorandum and Order, Pet.App. 20a).

On the October 26, 1983 scheduled date for pre-trial and trial, Petitioner did not appear. Rather he sent an associate, Robert Swickle. (Memorandum and Order, Pet.App. 27a). Settlement negotiations were stalled because Petitioner was not available. Swickle stated that he had been "pressed in for this" and that before any further progress could be made, the client had to speak with Petitioner, because "Mr. Jaques was handling the case." (Tr. 10/26/83 P.T. 4, Pet.App. 45a). Swickle represented that to his knowledge, Petitioner was in Baltimore in trial. (Tr. 10/26/83 P.T. 2, Pet.App. 43a).

[2] Baun spoke with Judge Aldrich's law clerk. (Pet. 5). The clerk said that Baun told her that neither Baun nor Petitioner would be able to appear the following day in Cleveland because of the trial in Baltimore. (Memorandum and Order, Pet.App. 20a). Baun and Petitioner maintain that Baun made no representations to the Court about Petitioner, but only stated that he, Baun, would not be able to attend the trial in Cleveland (Pet. 5). If Baun really said nothing at all about Petitioner's intentions, then Petitioner's behavior in not appearing for a scheduled trial and not even calling the Court with an excuse is even more bizarre than it first appears.

Petitioner further claims that since there was no evidence of Baun having represented anything about Petitioner's whereabouts to the Court, the Court's holding Petitioner in contempt under 18 U.S.C. § 401(1) was in error. This completely misreads the District Court's Memorandum and Order. At no point did the District Court base its finding of contempt under § 401(1) upon anything with respect to the Baun phone call of October 25, 1983. As noted in Argument III, *infra*, the District Court's reference to "misrepresentations" referred solely to the statements of Petitioner's associate, Robert Swickle, made directly to the Court at the pre-trial on October 26, 1983, that Petitioner was in Baltimore in trial. *See* Memorandum and Order, Pet.App. 27a.

At an impasse, Judge Aldrich had attempted to reach Petitioner in Baltimore by placing a call to Judge Howard. Judge Howard informed Judge Aldrich that he had excused Petitioner the day before specifically so Petitioner could appear before Judge Aldrich as required.

Judge Aldrich admonished Swickle about the apparent inconsistency in Petitioner's representations and the wasted expense of the venire panel and opposing counsel's time. Judge Aldrich directed Swickle to locate Petitioner and tell the Court by 4:45 p.m. that day (Wednesday) whether it would be necessary to recall the jury on the next day, Thursday. (Tr. 10/26/83 Hearing 5-6, Pet.App. 45a-46a). No one called the Court, however, until Thursday at 4:15 p.m. when Petitioner called to say that his client had rejected a settlement offer. Trial was set for Friday October 28, 1983. Due to additional conflicts on the part of Petitioner, the trial was rescheduled for Tuesday, October 31, 1983. The case was settled on Monday, October 30, 1983.

On November 2, 1983, the Court issued an Order to Petitioner and his two associates, Swickle and Baun, to appear before it and show cause why sanctions should not be imposed against them and why they should not be held in contempt.

A hearing was held on December 22, 1983 at which Petitioner represented himself and his associates. Throughout most of the hearing, Petitioner refused to answer the Court's question as to the reason Petitioner failed to appear for trial. Petitioner complained about the intrusion of the hearing upon his schedule "during this busy season." (Tr. 12/22/83 Hearing 6, Pet.App. 51a). When he finally did reply, Petitioner said:

> MR. JAQUES: I wasn't here because I couldn't be here. I was not here, Judge, because I had the screaming itches of the crotch. I was so badly in need of medical care that I had been in communication with my physi-

cian a lot. I wasn't here because I would have been scratching my testicles constantly if I had been here.

Judge —

The Court: Mr. Jaques —

Mr. JAQUES: Judge, do you understand that?

THE COURT: You don't have to be so graphic. You could have simply let the Court know that for medical reasons you were not going to be here and you could have —

MR. JAQUES: Judge, it was not a medical reason that could have been framed earlier. That's one thing.

THE COURT: It doesn't seem awfully difficult to me. Is there anything else? (Tr. 12/22/83 Hearing, 29-30, Pet.App. 64a).

The District Court held Petitioner in contempt under 18 U.S.C. § 401. First, the Court held that Petitioner had violated the provisions of 18 U.S.C. § 401(1) because Petitioner's request on October 19 for a delay of the trial, and his failure to appear at the rescheduled trial when he misrepresented that he was appearing before another judge "combine to constitute misbehavior 'so near' the Court so as to fall within § 401(1)." (Memorandum and Order, Pet.App. 29a). Second, the Court held that Petitioner's failure to appear for trial on October 26, 1983 was a violation of an Order of the Court and fell within 18 U.S.C. § 401(3).

I. CERTIORARI SHOULD BE DENIED BECAUSE THE QUESTION OF WHETHER A CIVIL CONTEMNOR SHOULD BE ENTITLED TO ALL THE DUE PROCESS PROTECTIONS AFFORDED A CRIMINAL CONTEMNOR: (1) WAS NOT RAISED BELOW; (2) IS NOT PRESENTED BY THE PARTICULAR FACTS OF THIS CASE; AND (3) IS WELL-SETTLED BY THE DECISIONS OF THIS COURT OVER THE COURSE OF THIS CENTURY; THOSE DECISIONS SHOULD NOT BE OVERTURNED NOW.

Petitioner concedes that this case is one of civil contempt only. (Pet. 11). Petitioner, however, asks this Court to review this case in order to address the question of whether courts must apply all criminal due process protections to a civil contempt proceeding. Petitioner also claims that he was denied due process of law, and, as a result, that the decisions of the lower courts in this case are in conflict with the decisions of other circuits. (Pet. 11-20).

This request for review should be denied for several reasons. First, this issue was not raised below. Second, irrespective of the classification of Petitioner's conduct, Petitioner in this case *was* accorded all the due proces safeguards required for an ajudication of his liability for contempt; the decisions of the lower courts in this case are not in conflict with those of other circuits. Third, this Court has definitively addressed the issues of due process in the civil contempt context several times in this century, as recently as 1983, and further review at this time is not needed.

A. Petitioner did not raise in the lower courts the argument that civil contempt proceedings should have all the due process controls of criminal proceedings.

In his petition, Petitioner argues for the first time that a civil contemnor should be afforded the same due process safeguards as a criminal contemnor. Petitioner did not present this argument to the Court of Appeals or to the District Court. In the Court of Appeals, Petitioner argued "that

these proceedings were in fact criminal and failed to afford him the procedural due process he was constitutionally entitled to as a criminal defendant." *In re: Jaques*, 761 F.2d 302, 305, (6th Cir. 1985); (Pet.App. 4a). Petitioner also did not raise this issue in the trial court. *See, generally,* Tr. 12/22/83 Hearing, Pet.App. 48a-72a. Since Petitioner did not afford the lower courts the opportunity to address this specific claim, it is not appropriate for this Court to review this issue.

B. Petitioner was afforded all of the due process protections required to be given to a contemnor, whether civil or criminal.

Petitioner was given all of the protections afforded to criminal contemnors even though he was held in civil contempt. Therefore, even if Petitioner's argument had some merit — that a civil contemnor should be afforded the protections given to a criminal contemnor — that issue is not raised by the particular facts of this case.

Irrespective of whether the contempt is considered "direct" or "indirect,"[3] Petitioner was only entitled to notice and a hearing and an impartial judge. *Taylor v. Hayes*, 418 U.S. 488 (1974). Petitioner was given notice, had opportunity to be heard and had his case heard by an impartial judge.

In the instant case, the District Court held that Petitioner's actions constituted contempt under both 18 U.S.C. § 401(3) and 18 U.S.C. § 401(1). Petitioner had been subject to

[3] Petitioner argues this contempt was "no doubt . . . indirect." (Pet. 12). This conclusion is apparently based on his misreading of the factual basis of the District Court's holding. Given that all the facts necessary to a finding of contempt were all within the first hand knowledge of the Court, the contempt is more properly classed as "direct." This distinction is of little use generally except as a guide to which contempts *may* be dealt with summarily (direct ones) even though such treatment is discouraged. *See, e.g., Taylor v. Hayes*, 418 U.S. 488, 496-500 (1974). Since Petitioner was not treated summarily in this case, the distinction is of no use here.

an order of the Court to appear for trial. See Argument II, *infra*. He failed to appear as required and thus violated an order of the Court within the meaning of 18 U.S.C. § 401(3). His failure to appear and the misrepresentations made directly to the District Court by Swickle were violations of 18 U.S.C. § 401(1) for which Petitioner was properly held in contempt. *See* Argument III, *infra*. The District Court did not rely on any *ex parte* communications (as argued by Petitioner, Pet. 11, 16), but had before it all of the information necessary to hold Petitioner in contempt. It had the official court records (i.e., the docket sheet and order setting the trial date) and had first hand knowledge of Petitioner's failure to appear and send an adequate substitute counsel.

The due process requirements that are to be afforded one charged with contempt have been established by several decisions of this Court.

1. Notice of a Hearing.

A criminal contemnor whose contempt was commited within the knowledge of the Court is only entitled to reasonable notice of the charge and a reasonable opportunity to defend himself. *Taylor v. Hayes*, 418 U.S. 488, 499 (1974).

Petitioner was given notice of the charges against him in a written Order to Show Cause issued on November 2, 1983.[4] Petitioner had almost two months to prepare for a hearing on the matter. At the hearing Petitioner was given an opportunity to explain his failure to appear by offering evidence and presenting witnesses.

Since the District Court in this case was fully aware, by its own senses, of all the facts necessary to support a find-

[4] Petitioner does not dispute the fact that he was given adequate notice of the charges against him. Further, any objection that Petitioner may have had regarding the adequacy of the notice was waived by Petitioner at the December 22 hearing when he declined the Court's explicit offer to continue the proceeding and put the details of the charges in writing. (Tr. 12/22/83 Hearing 14, Pet.App. 56a).

ing of contempt under either § 401(3) or § 401(1), nothing would be gained by requiring the Court to "prove" that trial was set for October 26 and that Petitioner failed to appear. Considerable time would be wasted to require that certified copies of Court records such as docket sheets and pre-trial and trial orders be introduced into evidence at the hearing.

2. Trial by an Impartial Judge.

Petitioner's argument that his case was not heard by an impartial judge is without merit.

A contemnor is not entitled to have the matter heard by another judge unless the contempt involved disrespect for, or criticism of, the judge or unless contemnor has so provoked the judge that the judge becomes "embroiled" in controversy and "cannot 'hold the balance nice, clear and true between the State and the accused . . .' *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)." *Taylor v. Hayes*, 418 U.S. at 501.

The District Judge was impartial. This case did not involve any disrespect for, or criticism of, the District Judge. *See* F.R.Crim.P. 42(b). Nor did the District Judge become "embroiled" in controversy. The contempt was primarily a failure on the part of Trial Counsel to appear for trial. There is no new issue presented to this Court; its prior decisions are directly controlling.

3. Burden of Proof

Petitioner argues that the burden of proof was improperly put upon him to show that his actions were not contemptuous and that this was an impermissible shifting of the burden of proof. (Pet. 15). He argues that when the Sixth Circuit affirmed the decision of the District Court in this case, it created a split of authority on this issue.

This Court's 1983 decision in *United States v. Rylander*, 460 U.S. 752 (1983), although not cited by Petitioner, is directly on point. In *Rylander*, a taxpayer failed to obey the District Court's enforcement order regarding an I.R.S. summons to produce corporate books and records. The taxpayer

was held in civil contempt. This Court recognized that the contemnor could raise the defence that it was impossible to comply with the order. This Court held that in raising the defence, the defendant bore the burden of production. *Id.* at 756-62.

Petitioner disobeyed an order of the Court when he failed to appear for the trial of his client's case and failed to send an adequate substitute. The Court had before it all of the information necessary to issue an Order to Show Cause to Petitioner to explain why he should not be held in contempt. The Court gave Petitioner an opportunity to appear and explain his conduct. Petitioner could have presented evidence and witnesses to exculpate himself. Petitioner failed to present an excuse satisfactory to the Court. The credibility and merit of his excuse is a matter for the trial court; that issue should not be reviewed.

By affirming the District Court, the Sixth Circuit did not hold that the burden of proof was shifted to Petitioner. It simply upheld the decision of the trial court, which had all of the facts before it to enable it to hold Petitioner in contempt without further fact finding. Thus, this decision of the Sixth Circuit is not in conflict with the cases cited by Petitioner for the proposition that the burden of proof remains on the party claiming contempt, *Matusow v. United States*, 229 F.2d 335 (5th Cir. 1956); *North American Coal Corp. v. Local Union*, 497 F.2d 459 (6th Cir. 1974), or that an order to show cause does not shift the burden of proof to the contemnor, *In re Van Meter*, 413 F.2d 536, 538 (8th Cir. 1969). In the instant case, the burden of proof was not shifted to the Petitioner. The Court had before it, by is direct knowledge, all the factual elements to sustain a finding of contempt. The burden was only on the Petitioner to come forward with a credible excuse that would merit not finding him in contempt. *United States v. Rylander*, 460 U.S. 752, 757 (1983).

C. The law in this area if well-settled by decisions of this Court and does not warrant review at this time

Petitioner is asking the Court to review this case in order to write out of the law the useful, rational distinction between civil and criminal contempts that has guided our courts for nearly a century. If Petitioner's request is granted, not only will a settled area of our jurisprudence be subjected to disorder, but already overburdened courts will be saddled with longer, more burdensome proceedings with no measurable gain in justice or fairness. Equally important, the courts will lose the modicum of flexibility they now have in dealing with the occasional disruptions of their daily business that warrant some action.[5]

The distinction between civil contempt and criminal contempt was recognized and clarified by this Court as long ago as 1911 in *Gompers v. Bucks Stove & Range Company*, 221 U.S. 418 (1911) and has been upheld and used by this Court many times since. *See, e.g., Lamb v. Cramer*, 285 U.S. 217 (1932); *McCrone v. United States*, 307 U.S. 61 (1939); *Nye v. United States*, 313 U.S. 33 (1941); *United States v. United Mine Workers of America*, 330 U.S. 258 (1947); *Maggio v. Zeitz*, 333 U.S. 56 (1947); *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1948); *Shillitani v. United States*, 384 U.S. 364 (1966); *Cheff v. Schnackenberg*, 384 U.S. 373 (1966); *Taylor v. Hayes*, 418 U.S. 488 (1974); *United States v. Rylander*, 460 U.S. 752 (1983).

This Court definitively addressed the issues of due process in the civil contempt context as recently as 1983 in the *Rylander* case. Further review is not necessary at this time.

D. Conclusion

Under the decisions of this Court a civil contemnor is not entitled to all the protections afforded to a criminal

[5] If the Court did wish to rewrite broadly the rules in this area, it would seem more appropriate to do so through promulgation of new Civil Rules.

contemnor. Under the decisions of this Court a contemnor is not automatically entitled to a hearing before another judge. Subject to exceptions not argued or relevant here[6], a contemnor is entitled only to a reasonable notice of the charge and a reasonable opportunity to be heard. A contemnor has the burden of coming forward to show that he was incapable of complying with the order that he violated. There is no unsettled question of law presented by Petitioner on this matter. Nor is there a conflict among the Circuit Courts on this subject.

Petitioner has requested that this Court completely rewrite the law in this area. Much of the law is based upon nearly a century of decisions by this Court. Some of the clarifications by this Court have been recent. Petitioner has not presented any compelling arguments, either with respect to his case, or with respect to contempt cases generally, for such a complete review and revision of the law in this area at this time.

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[6] Fuller due process standards might be applicable in certain circumstances not presented in this case, such as where the contemnor was charged with criminal contempt and sentenced to imprisonment for more than six months. *See, e.g., Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

II. CERTIORARI SHOULD NOT BE GRANTED BECAUSE 1) THE LAW WAS PROPERLY APPLIED BY THE LOWER COURTS CONCERNING 18 U.S.C. § 401(3), 2) THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS WITH RESPECT TO ANY ISSUE PRESENTED BY PETITIONER'S ARGUMENT, AND 3) THE ISSUE RAISED BY PETITIONER RESTS ON A DETERMINATION THAT IS PURELY FACTUAL.

Petitioner argues that this Court should grant certiorari in the instant case to resolve a conflict in the Circuit Courts regarding the construction of the "order" requirement of 18 U.S.C. § 401(3). There is no conflict in the Circuit Courts.

Petitioner argues that:

1. a telephone "message" from the District Court's deputy clerk to Petitioner that Petitioner was expected for trial on October 26, 1983 was not an "order" within the meaning of § 401(3) and, alternatively,

2. even if the "message" was an "order," the sending of an associate fulfilled Petitioner's obligation to the Court.

Both arguments omit crucial facts. Even a cursory review of the facts shows that the Circuit Court's decision in this case is in harmony with the other circuits.

A. There existed an "order" or "command" setting the trial date and requiring Trial Counsel to appear on October 26, 1983; this order was in addition to the "message" that Petitioner was expected for trial on October 26, 1983.

On August 1, 1983, the District Court sent a "Trial Order" to counsel in the underlying case. This "Trial Order" set October 24, 1983 as the trial date. A firm date was set, contrary to the usual practice of the District Court, to accommodate Petitioner's client who was represented to be out of the country.[7]

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[7] See n. 1, *supra*.

On October 19, 1983, Petitioner called the Court to request that the trial date be postponed because he had to be in trial in Baltimore. The trial was rescheduled to October 26, 1983 as a result of this request. The original "order" or "command" to appear at the trial was still in effect; the date of the trial had simply been postponed by two days. Petitioner was aware of the changed date; in fact, he requested it. The docket sheet indicates that the District Court's deputy clerk spoke with Petitioner himself when the date was rescheduled for October 26. (Exhibit C to Memorandum and Order, Pet.App. 37a; clearer copy Respondent's App. A-1).

The foregoing shows that Petitioner was under an order to appear on October 26. On October 24, the deputy clerk relayed a message to Petitioner, through the office of the Judge Howard in Baltimore, that Petitioner was expected for trial on October 26th. (Docket Sheet, Exhibit C to Memorandum and Order, Pet.App. 37a; clearer copy, Respondent's App. A-2). This message was simply a confirmation of a preexisting order requiring Petitioner's attendance.

A tardy arrival for a court appearance is disobedience of an order to appear in court at a specified time and, as such, is contemptuous. *In re Niblack*, 476 F.2d 930, 932-33 (D.C. Cir 1973) (Contemnor was 1 hour and 50 minutes late).

Petitioner argues to this Court that there is no evidence that he in fact received the message regarding his expected appearance on October 26th. However, he admitted at the hearing before the District Court on December 22 that he had in fact received the message from Judge Howard's secretary. (Tr. 12/22/83 Hearing 19-20, Pet.App. 59a). This message merely reinforced his obligation to appear.

The orders setting and resetting the trial date required Petitioner to appear for trial. The original trial date of October 24, was postponed for two days at *Petitioner's* request so that *Petitioner* could try the case. If one of Petitioner's associates could have taken Petitioner's place, there

was no need for the two day delay while Petitioner concluded another case. Further, Petitioner personally signed the Complaint in the case and asked for a jury trial. Petitioner was named as the "Trial Counsel" on the Trial Brief. (Exhibit A to Memorandum and Order, Pet.App. 35a).

The oral continuance of a trial date with the knowledge of all of the appropriate attorneys does not render the underlying order to appear for trial any less effective. This is especially so when the person violating the order is an attorney, who is an officer of the court with obligations to both the Court and his client to appear. When the attorney who fails to appear is the one who requested the change, as in this case, the violation is still more flagrant.

None of the cases cited by Petitioner are applicable to this case. The Circuit Court and the District Court were hardly striking out in new directions in holding that Trial Counsel was obligated to appear for a scheduled trial.

Petitioner argues that *In re Lamarre*, 494 F.2d 753 (6th Cir. 1974) applies to this case. That case held that to be enforced by criminal contempt, an order had to be:

> clear and definite and 'entered' upon the record or records of the court. . . . This normally means a written order issued by the court and personally served upon the alleged contemnor. Such an order may likewise be enforceable if entered in open court in the presence of the person concerned or with his knowledge clearly proved or issued in open court.

Id. at 758.

Because *LaMarre* involved criminal contempt it is not controlling in the instant case. Even if it were, its requirements of a clear and definite order entered upon the records of the court were met by the District Court. The alternative requirement that the contemnor have actual knowledge of the order was also met.

The contemnor in *LaMarre* was an insurance adjuster who had been "requested" to attend a settlement conference. The appellate court found that a "request" did not rise to the level of an "order" within the meaning of 18 U.S.C. § 401(3). In the instant case, Petitioner, an attorney, was subject to a Trial Order scheduling a case for trial. The order was clear and definite. Both the original Trial Order and the subsequent continuance of the date of the trial were entered on the record. The Petitioner had actual knowledge of the trial date. The Petitioner was the trial attorney in the case and had a duty to his client and the court to appear. It can hardly be said that the setting of a trial date is only a "request" that the attorneys in the case appear.

The Petitioner also relies on *In re Stewart*, 571 F.2d 988 (5th Cir. 1978). That case is also distinguishable from the instant case. First, the contempt was held to be criminal in nature. Second, the contemnor, an employer, was alleged to have violated, at most, a "message" which was passed on to him by one of unofficial status, one of his employees. Again, in the instant case, there was a clear and definite order setting the trial date. To the extent that the Order setting the trial date was orally modified, it was done so by personal communication between the Petitioner and the Court's deputy clerk — two officers of the court.

Petitioner cites several other cases, all of which are distinguishable for reasons similar to those of the foregoing cases. *In re Joyce*, 506 F. 2d 373 (5th Cir. 1975) was a case of criminal contempt which involved a "request" not an order. *In re Weeks*, 570 F.2d 244 (8th Cir. 1978) involved a criminal contempt citation under 18 U.S.C. § 401(1) not § 401(3). *United States v. Joyce*, 498 F.2d 592 (7th Cir. 1974) involved criminal contempt for a violation of a "vague and ambiguous" order. *Finney v. Arkansas Board of Correction*, 505 F.2d 194 (8th Cir. 1974) was a case involving yet another unspecific "order".

Finally, and most importantly, if this court were to review this case and adopt Petitioner's suggested reading of

18 U.S.C. § 401(3), courts would be unable to rearrange schedules by telephone and expect complete compliance. To hold that the rescheduling of this case was not an "order" or "command" directing the attorneys to appear would have serious implications. Courts would become leary about rescheduling fixed dates by telephone; some would avoid such rescheduling altogether. Cases truly in need of rescheduling because of dire circumstances (serious illness, etc.) would not be rescheduled.[8] Undoubtably, most attorneys would feel compelled to attend a trial of their client's case as rescheduled. However, when an attorney does not feel compelled to attend, due to the lack of a formal written order personally served on him, the trial court would be powerless to compel attendance directly or compensate those who attended promptly and waited for the derelict attorney.

B. Petitioner's failure to appear was not excused when a substitute appeared at the trial who did not have full authority over the case.

Petitioner claims that by sending substitute counsel to the trial he was discharged of whatever obligation he had to appear before the Court. He argues that the Circuit Court held otherwise and that such holding was in conflict with other circuit court opinions.

Again, Petitioner's presentation of the facts and law is incomplete. Neither of the lower courts disagreed that a

[8] Of course, a continuance could still be arranged if the court issued a written order and served it on those who were to appear or if it called those involved before it and continued the case in open court. Either method would be burdensome on the court. It would be virtually impossible to file and serve a written order for every trial date that is postponed for one or two days, as in the present case. The alternative would be to have all of the parties appear as originally scheduled for trial and then fix the new trial date in open court in the presence of all involved. Such a practice would waste the time and resources of the court, counsel and their clients. Further, requiring one to appear for the ordering of the continuance, when that person is the one seeking the continuance for the reason that he absolutely cannot appear on the scheduled date would defeat the purpose of the requested postponement.

fully prepared substitute counsel with full authority to settle and to try the case might have discharged Petitioner's obligation to the Court. The lower courts did not have to reach this issue. As a matter of *fact*, Petitioner failed to send *adequate* substitute counsel.

Petitioner failed to appear on October 26 for trial as required. Robert Swickle, an associate of Petitioner's, did appear for the plaintiff. As settlement negotiations stalemated, Swickle explained to the Court that he had "been pressed in for this" and that the client needed to talk with Petitioner since "Mr. Jaques [Petitioner] was handling the case." (Tr. 10/26/83, 4; Pet.App. 45a).

Several cases similar to this case have been heard in the Circuit courts. In *In re Marx*, 553 F.2d 874 (4th Cir. 1977), the Fourth Circuit upheld a criminal contempt citation of the District Court. In that case the principal attorney had failed to appear for his client's trial and did not provide a legitimate excuse. Local counsel did appear and tried the case. The Court found that the principal attorney had violated 18 U.S.C. § 401(3) by disobeying the Court's order setting the trial date. The instant case is similar except that the District Court did not go so far as to hold Petitioner in criminal contempt. Rather, it ordered him to compensate those who had been injured by his actions.

In the instant case the District Court determined that Petitioner had not sent an adequate substitute. This determination was made from the facts known to the District Court first hand and included Swickle's own statements regarding his ability and limitations in the case. This finding of fact is not appropriate for review. Due to the factual circumstances of this case, the question of whether a prepared and authorized substitute can relieve a trial attorney from his obligation to appear at the trial was never addressed by the Circuit Court and the District Court. The decisions of those courts are, therefore, not in conflict with the decisions of any other circuit courts.

C. Conclusion

The Sixth Circuit and District Court opinions are not in conflict with other decisions. The law applied in this case is not in dispute. The purely factual nature of the issue makes this issue inappropriate for Supreme Court review. The District Court had before it first hand knowledge of the facts, including the Trial Order, the postponement of the trial at the request of Petitioner, and Swickle's inability to fully handle the case in Petitioner's absence.

It is essential that a trial court have control and authority over its schedule. The demands of the present day on the federal courts are great. The court should be able to require the appearance of the attorney himself or, at a minimum, a fully prepared substitute who has complete authority to commence or settle the case. When an attorney violates the requirement that he appear for trial, it is but a mild sanction to hold that attorney in civil contempt and require that he compensate those who were injured as a result of his conduct.

III. THIS COURT SHOULD NOT GRANT CERTIORARI BECAUSE THE DECISIONS IN THIS CASE APPLYING 18 U.S.C. § 401(1) ARE NOT IN CONFLICT WITH ANY DECISIONS OF THIS COURT OR ANY OTHER CIRCUIT; PETITIONER'S ARGUMENT IS BASED ON A COMPLETE MISREADING OF THE FACTS RELIED ON BY THE DISTRICT COURT IN APPLYING 18 U.S.C § 401(1) TO PETITIONER

Petitioner argues that this Court should grant certiorari because the lower court decisions in this case are in conflict with *Nye v. United States*, 313 U.S. 33 (1941), and the decisions of other circuits. There is no such conflict. Petitioner's claim is based upon a complete misreading of the facts on which the District Court based its decision.

The District Court held Petitioner in contempt under 18 U.S.C. § 401(1) because of his failure to appear at the scheduled October 26, 1983 pre-trial and trial taken together with Petitioner's October 19, 1983 phone call to the Court to request a continuance from the previously set October 24 date to the October 26 date. The District Court held that these two events — Petitioner's request for a continuance until October 26 and then his failure to appear on that date — combined "to constitute misbehavior 'so near' to the presence of this Court as to fall within § 401(1)." (Memorandum and Order, Pet.App. 29a).

The District Court further held that such failure to appear was misbehavior that "obstructed the administration of justice. Had Jaques appeared as scheduled on October 26, 1983, the trial could have commenced, or the settlement discussions could have been more than just a dilatory charade. . . . Jaques' failure to appear, and his day to day continuances prevented this Court from either proceeding with Ahmed's trial or scheduling a substitute matter." (Memorandum and Order, Pet.App. 30a).

The District Court held that while the Petitioner's failure to appear was a "serious matter", the Petitioner's misrepre-

sentations regarding his reasons for not attending served to compound his offense. The Court regarded the misrepresentations as a "very serious matter." (Memorandum and Order, Pet.App. 30a).

The misrepresentations referred to by the District Court were those made in person, directly to the Judge, at the October 26, 1983 pre-trial by Petitioner's associate, Robert Swickle.[9] Swickle represented that Petitioner was in Baltimore in trial (Tr. 10/26/83 P.T., Pet.App. 43a) when in fact Petitioner had been excused by the Baltimore Court the previous day ostensibly in order to attend the Cleveland trial. The District Court found these facts expressly in its Memorandum and Order (Pet.App. 27a; *see also* Memorandum and Order, Pet.App. 22a).

Petitioner states that he expressly sent Swickle in his stead. (Tr. 12/22/83 Hearing 19, Pet.App. 59a). In light of these facts, the District Court's finding that Petitioner was liable not only for his failure to appear, but also for the misrepresentations was well-founded. Since the misrepresentations were made directly to the Court at a pre-trial, the "misbehavior" is properly viewed as having taken place in the actual presence of the Court, as required by § 401(1).

The District Court did not base its holding in any part on the October 25, 1983 phone call from Petitioner's associate, Gary Baun, to the Court.

Petitioner's claim that "Thus the critical issue is whether that conduct [Baun's October 25 phone call] falls within the 'so near thereto' language of the statute," Pet. 27, is entirely incorrect and based on a complete misreading of the District Court's Memorandum and Order.

Even without the issue of misrepresentation, Petitioner's failure to appear for a scheduled trial in which he was Trial Counsel constitutes "misbehavior" "so near" to the Court

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[9] Swickle was sent to appear directly by Jaques. (Tr. 12/22/83 Hearing 19, Pet.App. 59a).

as to constitute an obstruction of the administration of justice rendering Petitioner liable for civil contempt under § 401(1). Indeed, a plain reading of the language of the statute would find Petitioner's failure to appear to be misbehavior in the *actual* presence of the Court.[10]

This holding of the District Court and its affirmance by the Court of Appeals does not conflict with the cases cited by Petitioner. The decisions are in full accord with the *Nye* construction of the 'so near thereto' language of § 401(1) as having a geographical reference only. *Nye v. United States*, 313 U.S. 33, 47-52 (1941); *Farese v. United States*, 209 F.2d 312 (1st Cir. 1954), *Schmidt v. United States*, 124 F.2d 177 (6th Cir. 1941) and *In re Stewart*, 571 F.2d 958 (5th Cir. 1978), involved actions outside the actual physical presence of the court in accord with the *Nye* construction of "so near thereto". *Farese*, *Schmidt* and *Stewart* are not in conflict with the decisions in the present case. In each of these cases it was the actual physical act of the actor that was disruptive of the court. As such, the courts' inquiries focussed on the geographical proximity of those acts to the courts themselves. In the instant case, it was not *what* Petitioner was doing that was disruptive of the Court, but what he was *not* doing. It was Petitioner's *non*-appearance at the scheduled trial that was disruptive. *That* (non-)act was directly cognizable by the Court and immediately disruptive. As such, it was grounds for the Court's holding Petitioner civilly liable for contempt under § 401(1).

Not only was Petitioner's failure to attend misbehavior in the actual presence of the Court, but Swickle's representations were without doubt also in the actual presence of the Court. Petitioner argues that Petitioner cannot be held

[10] This offending conduct of failing to appear was only made more pointed by the fact that the trial was put off two days at ='s personal request so that he could attend. As the District Court noted: "Jaques' own telephone call on October 19 indicates that he was aware of his obligation to attend, and he was aware that the Court was continuing the trial date solely for the purpose of accomodating him." Memorandum and Order, 30a.

vicariously liable for the misrepresentations of his associate. Although Petitioner focuses solely on the Baun phone call, his argument is applicable, or inapplicable, to the representations made by Swickle to the District Court. Petitioner claims that the decisions in this case are irreconcilable with *North American Coal Corp. v. Local Union*, 497 F.2d 459 (6th Cir. 1974). This is not so. In *North American Coal* the Sixth Circuit held that there could be no vicarious *criminal* liability on the part of the officers of a union for the acts of the union's members. The Sixth Circuit merely applied sound principles of criminal law to the area of labor unions in light of the expressed Congressional intent not to weaken "labor unions as a social institution." *Id.* at 466. Competing concerns in the civil area, such as compensation to the victims of the defalcation, require that we be civilly liable not only for our own, direct acts, but also for the acts of our agents and partners.[11]

Attorneys are under a particular duty as officers of the courts to be forthright in their dealings with the courts. *See, e.g.*, A.B.A. Code of Professional Responsibility, DR 7-102(A)(5).

The District Court in this case required no more of Petitioner than that he compensate the victims of his misbehavior for the expenses caused directly by him.

In sum, there is no legal issue for this Court to resolve. The District Court properly identified the acts of misbehavior that obstructed justice. These acts — both the failure to attend and the misrepresentations — provided the Court with adequate bases to hold the Petitioner civilly liable for either act. Petitioner's arguments are based on a misreading of the holding of the District Court decision. The

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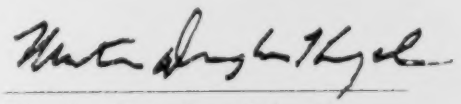
[11] Such vicarious civil liability has been a significant part of the common law at least since the 13th century. Bracton, in mid-13th century, writes of the civil liability of masters for the wrongful acts of their servants that are not affirmatively disclaimed. Bracton, ON THE LAWS AND CUSTOMS OF ENGLAND, f. 158 (servant's acts with respect to chattels), ff. 172, 204 (servant's acts with respect to land) (Ed. Thorne, 1968).

decisions of the lower courts in this matter are in full accord with *Nye* and its progeny.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,



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The Honorable Ann Aldrich,
United States District Judge
for the Northern
District of Ohio

January 23, 1986

APPENDIX

4-9-83 1-83
4:00
10-25-83
4:00

(1)

DIST.	OFF.	DOCKET YR.	DOCKET NUMBER	FILING DATE MO.	DAY	YEAR	J	NOS	A	O	R 23	DEMAND $	OTHER	JUDGE/MAG NUMBER	JURY DEM.	YR	DOCKET NUMBER
0647	01	80	0506	04	04	80	3	340				NEAREST $1,000 $1,200,000.00		4713	J	80	0506

PLAINTIFFS

AHMED, Ali S.

DEFENDANTS

REISS STEAMSHIP COMPANY

EXHIBIT C

CAUSE

46 USCA §688, et seq (Jones Act); General Admiralty & Maritime Law

JUDGE ALDRICH

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JURY

1-10-83 Pltf's resp per Baum - 4 trials set in Tampa starting 1-17-83 - will be unavailable due to ill, Dept in Yemen since Sept. 82, - no set P.T. as 4-5-83 4:00 C, he will have pltf's here, he will send letter to Court & Dept, per Dailey's resp.

3-21-83 Notice: P.T. re-set to 4-11-83 4:30 C

Action arose in Cuyahoga County (Category 48)

CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID DATE	RECEIPT NUMBER	C.D. NUMBER	STATISTICAL CARDS CARD	DATE MAILED
	4-4-83	# 14122		44 4/30/80	
				44	

UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev. 1/75)

4-13-83 Notice Dep. T. 10-4-83 (5 days) 9:30 C P.T. 10-3-83 4:00 C, briefs 9-26-83, Notices mailed

8-1-83 Notice: T. 10-24-83 9:00 C P.T. 10-20-83 4:00 C

10-19-83 Pltf's resp per Jaques - move P.T. re 10-20-83 4:30 C & T. re 10-24-83 9:30 C per Dailey's resp, per Swickle's resp

10-24-87 Phone conf per Judge's Secretary's req - counsel foregues to be in Aldrich's room Wed for trial - his partner can take verdict in Balto, per Bailey - P.T. Med. A.N., per Swickle.

Supreme Court, U.S.
FILED
FEB 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-489

In The

Supreme Court of the United States

October Term, 1985

LEONARD C. JAQUES,
Petitioner,

v.

THE HONORABLE ANN ALDRICH,
UNITED STATES DISTRICT JUDGE
FOR THE NORTHERN DISTRICT OF OHIO,
and REISS STEAMSHIP COMPANY,
Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

This Petition for Writ of Certiorari arises from the split decision of the United States Court of Appeals for the Sixth Circuit [*In re Jaques*, 761 F2d 302 (6th Cir, 1985)] affirming the contempt citation of an attorney. A full Statement of the Case has been provided in the Petition at pp. 2-10. Instead of restating the facts at length, Petitioner will discuss them in the context of the issues presented.

ARGUMENT

I.

WHETHER, IN A CONTEMPT ACTION AGAINST AN ATTORNEY, THE "CIVIL" NATURE OF THE CHARGE RENDERS INAPPLICABLE THE PROTECTIONS AFFORDED BY DUE PROCESS GUARANTEES TO ALLEGED CRIMINAL CONTEMNORS.

The issue presented is whether the traditional due process rights of alleged contemnors [imposition of the burden of proof on the charging party; the prohibition against a contempt citation which has no evidentiary basis; the right to confront adverse witnesses (to be free from a citation based on *ex parte* communications with the fact-finder); and the right to an impartial decision-maker] are inapplicable because of the "civil" nature of the charges. In her Brief in Opposition ("Opposition"), Respondent contends that this issue is not preserved, that Petitioner was afforded all due process rights, and that this Court should not grant review.

To be sure, Petitioner did not enmesh himself in an extended discussion of the nuances of "civil" contempt during the contempt hearing. This is scarcely surprising since Respondent herself declined to respond to Petitioner's attempt to discern whether the proceedings were "civil" or "criminal" (53a, 54a). Indeed, Respondent believed that she was dealing with a "criminal" contempt (27a). The appellate judges divided on the proper characterization of the proceedings. Petitioner cannot be faulted for failing to present issues of "civil" contempt jurisprudence in the trial court when the case was "criminal" in that forum.

The Court of Appeals found no "preservation" impediment, as it decided the constitutional question on the merits. This Court should likewise deem the issue preserved.

The issues which Petitioner seeks to have reviewed by this Court were all presented to the Court of Appeals. There, Petitioner urged that the contempt citation be reversed on the ground that there was no way to confidently determine

whether the contempt proceedings were criminal or civil in nature [Appellant's Brief on Appeal ("Brief"), pp. 18-20]. Because of this uncertainty, Petitioner assumed that they were criminal, but contended that the same outcome would be required under a civil contempt analysis, and that the due process rights implicated were the same in either event (Brief, p. 21, fn. 9; p. 38, fn. 12). Specifically, Petitioner claimed that he had been denied due process by the Court thrusting upon him the burden of disproving the contempt charges (Brief, pp. 22-24, 39), by a contempt finding reached despite the lack of any supporting evidence presented at the hearing (Brief, pp. 22-24, 33, 39), by the Court's reliance on *ex parte* conversations conducted in Petitioner's absence (Brief, pp. 31, 33, 40-42), and by the partiality and multiple capacities of the trial judge (Brief, pp. 42-49).

Finally, the precise issue presented stems from the unanticipated tack taken by the Sixth Circuit majority in justifying affirmance. Until issuance of the appellate decision, there was no construction of the contempt as "civil," and consequently there was no occasion to consider the constitutional implications flowing from use of that label. Petitioner has amply "preserved" his quest for review of the rationale employed by the Court of Appeals.

Respondent has alleged that Petitioner in fact received the procedural protection that would have existed if the contempt proceeding were viewed as "criminal" (Opposition, pp. 7-10). Suffice it to note that the Court of Appeals was unable to conclude that Petitioner was afforded the due process protections available to an alleged criminal contemnor; it was able to affirm only on the basis that, because of the "civil" nature of the proceedings, these protections did not apply.

Respondent suggests that the trial court was justified in finding Petitioner in contempt without any formal evidence because she already had personal knowledge of all the facts before the hearing was conducted. Let us temporarily overlook the independent due process problems presented by a

contempt citation issued by a fact-finder that had already prejudged the outcome prior to providing the accused an opportunity to be heard. Respondent's contention is factually untenable. At the contempt hearing,[1] and in her Memorandum and Order,[2] Respondent relied on unproven "facts" which were plainly not within the Court's own knowledge, and could only have been gleaned from *ex parte* conversations with others (never presented as witnesses) conducted in Petitioner's absence.

In finding Petitioner guilty of misrepresentation (*see* Issue III), the Court was, at the least, required to compare the representations with the actual facts. She was required to determine what Baun told her clerk (purportedly, that Petitioner was engaged in trial in Baltimore) with the actual facts (whether he was in Baltimore). Respondent had first-hand knowledge of *neither* component.

Regarding the allegation that Petitioner disobeyed an "order," the Court was required to determine what was told to Petitioner (*i.e.*, *what* he was "ordered" to do) (Issue II). This, in turn, hinges on what Respondent's clerk said to Petitioner, another matter outside the Court's personal knowledge. Whether Petitioner obtained adequate substitute counsel (which Respondent deemed would satisfy any order to attend) depended on Mr. Swickle's ability to try the case in Petitioner's stead, a matter on which the Court depended on statements made to her by Swickle in Petitioner's absence.

---

[1] *See* 50a, 53a, 54a, 56a, 62a (conversations between Respondent and Judge Howard); 50a (conversations between Mr. Baun and Mr. Swickle). The judge also referred to conversations involving "the Court," which apparently were actually between Baun and the Court's clerk and presumably related to the judge by her clerk (*see* 49a, 69a, 70a, 71a).

[2] *See* 18a, 21a, 34a (conversations between Respondent and Judge Howard); 20a (conversations between Mr. Baun and Mr. Swickle); 22a, 25a, 27a, 31a (conversations between Respondent and Mr. Swickle). This was done despite Petitioner's contention at the contempt hearing that the Court was mistaken and misinformed as to the actual occurrences (72a).

This was not one of the extraordinary "direct" contempts in which, since all relevant facts are known to the court through its own senses, the court may summarily issue a finding of contempt allowing only an opportunity for the contemnor to allocute regarding factors which may mitigate punishment (*see* Petition, pp. 11-13). It was not so treated by either of the lower courts, and should not be so treated by this Court.

As her alternative argument, Respondent posits that it was entirely proper for her to impose on Petitioner the burden of disproving the contempt charges, citing *United States* v *Rylander*, 460 U.S. 752 (1983). *Rylander* involved the unique two-stage procedure for enforcement of an IRS summons. In *Rylander*, the Respondent was served with a summons and failed to produce the documents sought, thus commencing the first-stage proceedings to obtain an order enforcing the summons. At this hearing, the Court ordered enforcement, a ruling which conclusively established that Rylander was then in possession of the records sought (460 U.S. at 756-757, 760). There was no claim that Rylander was given anything less than a full, fair, and constitutionally adequate hearing at this time.

Rylander then disobeyed the enforcement order, thus triggering the second stage: a contempt hearing for non-compliance (460 U.S. at 760). The contention available to the non-producer was the lack of present possession, a contention denominated a "defense" by the *Rylander* Court (460 U.S. at 755, 757, 760). Settled procedures imposed on the alleged contemnor the burden of coming forward with evidence to disprove the presumption arising from the initial enforcement order (460 U.S. at 755, 757, 760).

Unlike this case, the trial judge in *Rylander* endeavored to hold a testimonial contempt hearing. When Rylander refused to submit to cross-examination, asserting the privilege against self-incrimination, the District Court found that Rylander had failed to present evidence in support of the defense of non-possession, and therefore issued a contempt citation which this Court ultimately sustained.

Nothing in the *Rylander* opinion supports the broad proposition that the burden of proof in all civil contempt actions is imposed on the accused. The decision in that case is limited to its facts and to the unique two-stage setting in which civil contempt may be invoked to enforce an IRS summons. It is one thing to say that one who has had a full and fair hearing on the issue of possession of records, and who is afforded a second testimonial hearing, may be held to the burden of refuting a presumption arising from the prior adjudication. It is quite another to say, as Respondent suggests, that Petitioner was entitled to no testimonial hearing at all and was forced to disprove allegations never previously adjudicated.

Petitioner has previously pointed out the unprecedented tack taken by the Sixth Circuit in making the "civil" or "criminal" nature of the proceedings determinative of whether due process requires anything more than notice of the charges and an opportunity to be heard. Where the lower courts have erred is in viewing the critical distinction as "civil/criminal" rather than "direct/indirect" (Petition, pp. 11-20).

In response, Respondent points out that the distinction between civil and criminal contempts has long been recognized (Opposition, p. 11). This observation misses the mark. To be sure, the theoretical nuances distinguishing the two may be generally understood, though difficult to apply. The fine line that divides the two is simply not what this case is all about.

What *is* involved is the issue of whether the "civil" label renders inapplicable such fundamental procedural protections as the right to insist that the charging party bear the burden of proving the allegations by competent evidence, and the right to be free from a conviction predicated on *ex parte* conversations conducted by the fact-finder in the accused's absence. *Those* questions have never been addressed by this Court. They should be.

II.

THE CONSTRUCTION OF 18 USC § 401(3)

The ruling below finds Petitioner in contempt for the fact that Mr. Swickle appeared to represent the plaintiff in *Ahmed*, rather than Petitioner who was verbally informed that his attendance was "expected." Thus are raised important issues of statutory construction: whether a telephonic message of expectation is an "order" within the meaning of 18 USC § 401(3) and, if so, whether an attorney fulfills his obligation by obtaining the appearance of an associate in his stead (Petition, pp. 21-25).

Respondent urges that trial courts who contemplate invoking the contempt power should not be required to first employ formal orders, because it would be "burdensome" to do so (Opposition, p. 17). There is room for serious debate over how "burdensome" it would really be for courts to employ orders when they intend to find in contempt those who ruffle judicial feathers. What is beyond debate is that these are the sort of policy decisions which have already been made by Congress when it enacted 18 USC § 401(3) with the intent to severely circumscribe use of the awesome contempt power. *Nye* v *United States*, 313 U.S. 331 (1941); *Cammer* v *United States*, 350 U.S. 399 (1956). It is not the province of this Court to second-guess the wisdom of the "burdensome" limitations which Congress intentionally interposed.

Respondent also acknowledges in principle that Mr. Swickle's presence might be deemed to fulfill any obligation imposed by the "Order" if he had "full authority to settle and to try the case" (Opposition, p. 18). She argues, however, that he was not an "adequate substitute."

The first flaw with this argument is that the impression that Mr. Swickle was not an adequate substitute was an impression which the Court gleaned from the conversations with Swickle on October 26th conducted in Petitioner's absence. *In re Oliver*, 333 U.S. 257 (1948) makes clear the

constitutional impermissibility of premising a contempt finding on "facts" developed in this *ex parte* fashion.

The second flaw is the notion that *any* attorney *ever* has the authority to unilaterally settle the client's case. On October 26, 1983, progress was made toward settlement, Swickle discussed the settlement offer with the client, and it was Mr. Ahmed who resisted settlement (44a-45a; 68a). The adequacy of Mr. Swickle is not impugned by his adherence to ethical strictures which forbade him from compromising his client's cause over the client's objection.

The final flaw is that there is absolutely no record support for the contention that Mr. Swickle was not prepared to try the case. This question was not even addressed at the proceedings of October 26th (43a-46a), and at the contempt hearing, both Swickle and Petitioner confirmed that the former was prepared to try the case (56a, 58a, 59a, 66a-67a, 68a).

Mr. Swickle was a demonstrably "adequate" substitute. This case squarely presents the issue on which the circuit courts are divided: whether an attorney who obtains adequate substitute counsel may nonetheless be held in contempt for the failure to personally appear.

III.

THE CONSTRUCTION OF 18 USC § 401(1)

Petitioner has challenged the rulings below which find him in contempt under 18 USC § 401(1) for purportedly misrepresenting to the Ohio trial judge that he was engaged in trial in Baltimore. He has contended that he made no such representations; that § 401(1) is not to be construed as permitting vicarious contempt liability for purported misrepresentations made by his associate, Mr. Baun; and that any misrepresentations by Baun from Baltimore did not occur "so near" to Respondent in the geographic sense used in the statute (Petition, pp. 27-29).

At the contempt hearing, Respondent continually referred to alleged misrepresentations made by Petitioner (53a, 54a, 62a). In her Memorandum and Order, as well, she found that Petitioner himself made misrepresentations (23a, 29a, 30a). Her Opposition fails to cite a single alleged misrepresentation made by Petitioner, and tacitly admits that Petitioner himself made no actionable misrepresentation.

Recognizing the untenability of any contempt citation predicated on Baun's telephone call, Respondent disavows any such holding, and now claims that the misrepresentation for which Petitioner was held liable was that of Swickle[3] (Opposition, pp. 21, 22). There are substantial grounds for questioning the accuracy of the construction currently offered by Respondent,[4] but in any event the contempt citation is no more tenable under the Swickle rationale than under the Baun rationale previously addressed.

---

[3] It is also contended that the misconduct under § 401(1) consisted in Petitioner's October 19th telephone call requesting a continuance and his failure to appear at trial on the 26th (Opposition, p. 20). This contention cannot withstand scrutiny.

Petitioner was not in the Court's presence or in close physical proximity on the 26th. Indeed, it was the very fact that Petitioner was *not* nearby that provoked the institution of contempt proceedings.

One is at a complete loss to understand how the telephone call of the 19th requesting an adjournment constitutes contumacious misconduct by Petitioner. The call was made by unnamed office personnel rather than Petitioner and accurately related the current status of the Baltimore trial (19a-20a). Even if the prediction that the trial would be completed five days later could somehow be deemed the sort of representation of fact upon which to hang a contempt conviction, the relevant conduct occurred in Detroit and is therefore beyond the scope of § 401(1) for the same reasons discussed regarding Baun's Baltimore call.

[4] At the contempt hearing, the Court made only one oblique reference to purported statements by Swickle regarding Petitioner's whereabouts, "there was a discussion and representations made by counsel [on October 26th]" (60a). In contrast, the Court repeatedly referred to the Baun call (49a, 69a, 70a, 71a). When Respondent discussed the "two problems" [two charges], one of these was "the representation that was made by Mr. Baun on the telephone on Tuesday evening that you would in fact be in Baltimore on Wednesday" (65a). The Court of Appeals did not construe the contempt finding in the fashion advocated by Respondent. Both the lead Opinion and Dissent referred only to the Baun phone call (2a, 16a). It is thus quite clear that it was the Baun telephone call which was the purported misrepresentation for which Petitioner was found vicariously liable.

Concededly the hypothesis that the critical representations were those of Swickle would defeat Petitioner's contention that § 401(1) is unsatisfied due to the absence of the "presence or so near" element. Unlike the statements of Baun, those of Swickle were in fact made in the Court's presence.

To cast the case in this fashion, however, demonstrates all the more vividly the unconstitutionality of the proceedings below. The only statement of Swickle in this regard is (43a):

> "THE COURT: . . . Mr. Swickle, do you have any idea where Mr. Jacques (*sic*) is today?
> MR. SWICKLE: No, I don't. To my knowledge, he is in Baltimore in this trial."

There is not a scintilla of evidence that Swickle in fact knew where Petitioner was or that he knew that Petitioner was not in Baltimore. Respondent has not even suggested that there exists any evidence that the quoted statements were untrue. That Petitioner has been found in contempt for Swickle's honest response to the Court's question vividly demonstrates the manifest injustice wrought by the decisions below.

Thus, we are brought full circle back to the question of whether one may constitutionally be held in contempt in the utter absence of any competent evidence adduced in support of the charges, simply because the contempt is denominated "civil." The central due process and statutory construction issues warrant this Court's attention.

CONCLUSION

Petitioner submits that the issues presented are worthy of this Court's attention. Respondent's Brief in Opposition does not detract from this conclusion. A writ of certiorari should be issued.

Respectfully submitted,

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